TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]113

JOHN L. WHITING–J. J. ADAMS COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES L. BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JULY 30, 1920.

(27,818)

(27,818)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 461.

HN L. WHITING-J. J. ADAMS COMPANY, PLAINTIFF IN ERROR,

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ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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99 & Detweiler (Inc.), Printers, Washington, D. C., February 1, 1921.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between John L. Whiting—J. J. Adams Company, a corporation duly established and existing under the laws of Maine and having an usual place of business in Boston, in the County of Suffolk, in the Commonwealth and District of Massachusetts, plaintiff, and Charles L. Burrill, a resident, citizen and inhabitant of Boston, in the County of Suffolk and Commonwealth of Massachusetts, in our District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at the city of Washington, D. C. on the fifth day of August next, in the said Supreme Court of the United States that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White Chief Justice of the United States, the fourteenth day of July, in the year of our Lord one thousand nine hundred and twenty.

JOHN E. GILMAN, JR.,
Deputy Clerk of the District Court of the United States, District of Massachusetts.

Allowed by
G. W. ANDERSON,
U. S. Circuit Judge.

2 *Return of District Court on Writ of Error.*

District Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal

of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States as within commanded.

In testimony whereof, I John E. Gilman, Deputy Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this twenty-sixth day of July A. D. 1920.

[Seal of the United States District Court, Massachusetts.]

JOHN E. GILMAN, JR.,
Deputy Clerk.

3 *Transcript of Record of District Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States Begun and Holden at Boston, Within and for the District of Massachusetts, on the Third Tuesday of March, Being the Sixteenth day of March, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Before the Honorable James M. Morton, Jr., District Judge.

No. 1061, Law Docket.

JOHN L. WHITING—J. J. ADAMS COMPANY, Plaintiff.

v.

CHARLES L. BURRILL, Defendant.

The Writ and Declaration in this cause were filed in the clerk's office on the twenty first day of February, A. D. 1919, and are in the words and figures following:

Writ.

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of Charles L. Burrill, a resident, citizen and inhabitant of Boston, in the County of Suffolk and Commonwealth of Massachusetts, in our District of Massachusetts, defendant, to the value of ten thousand dollars, and to summon the said defendant (if he may be found in your District) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the

third Tuesday of March, 1919. Then and there, in our said Court, to answer unto John L. Whiting—J. J. Adams Company, a corporation duly established and existing under the laws of Maine and having an usual place of business in Boston, in the County of Suffolk, in the Commonwealth and District of Massachusetts, plaintiff. In an action of Contract; to the damage of the said plaintiff (as it says) the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, The Honorable James M. Morton, Jr., at Boston, the twentieth day of February, in the year of our Lord one thousand nine hundred and nineteen.

JOHN E. GILMAN, JR.,
Deputy Clerk.

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, Feb. 20th, 1919.

Pursuant hereunto I have this day at — o'clock and — minutes — M., attached a chip as the property of the within named Charles L. Burrill and afterwards on the same day, I summoned the within named Charles L. Burrill to appear at Court and answer as herein directed by giving to him in hand at Boston in said District an original summons to this writ.

JOHN J. MITCHELL,
United States Marshal,
By JOHN H. BACKUS,
Deputy.

Declaration.

(Filed February 21, 1919.)

(MEMORANDUM.—Copy of Declaration is here omitted, as an amended Declaration was subsequently filed and allowed by consent, and will be found hereafter recorded. James S. Allen, Clerk.)

Upon the filing of the writ and declaration herein, an Order to Plead was entered.

On the 17th day of March, A. D. 1919, the following Answer was filed.

Answer.

I.

And now comes Charles L. Burrill, and, in denial of the jurisdiction of this court of the above entitled cause, makes answer to the plaintiff's writ and declaration as follows:

1. The defendant is, and on or about October 1, 1918, was, the duly elected Treasurer and Receiver-General of the Commonwealth

of Massachusetts, that, as such Treasurer and Receiver-General, it was his duty to collect and receive all sums of money due the Commonwealth on account of taxes lawfully assessed and payable to it, particularly including all taxes assessed upon foreign corporations under St. 1909, c. 490, pt. III, §56, and Gen. St. 1918, c. 253; that at some time prior to October 1, 1918, a tax under the provisions of Gen. St. 1918, c. 253, in the sum of $4,591.17, was assessed by the Tax Commissioner of the Commonwealth upon the plaintiff; that on or prior to October 7, 1918, a tax in the sum of $480, under the provisions of St. 1909, c. 490, pt. III, §56, was assessed by the Tax Commissioner of the Commonwealth upon the plaintiff; that on October 1, 1918, said sum of $4,591.17, and on October 7, 1918, said sum $480, in payment of such taxes so assessed, were voluntarily paid to the defendant solely in his capacity of Treasurer and Receiver-General of the Commonwealth, and not otherwise, without protest and without any threats, compulsion or duress by the defendant or any other person and without the issuance of any legal process for enforcing such payment; that on December 5, 1918, in consequence of a decision of the Supreme Judicial Court of Massachusetts in the case of American Printing Company v. Commonwealth, 231 Mass. 237, there was repaid to the plaintiff by the defendant, out of the treasury of the Commonwealth, the sum of $1,065.23, as a part of the tax assessed under Gen. St. 1918, c. 253, determined to have been illegally assessed; that the balance of said first-mentioned tax and the full amount of said second-mentioned tax were paid by the defendant into the treasury of the Commonwealth of Massachusetts as a part of the general revenue of the Commonwealth and have now been expended by it for general public purposes; that, subsequently, and within six months from the date of the payment of all of said taxes, the plaintiff filed in the Supreme Judicial Court of the Commonwealth of Massachusetts for the County of Suffolk a petition for the abatement of said taxes in accordance with the provisions of St. 1909, c. 490, pt. III, §70, which petition was pending in said court until January 31, 1919, when it was dismissed upon the motion of the petitioner, the plaintiff in this action; that the remedy established by said section 70 is the only remedy provided by the statutes of the Commonwealth for the recovery of taxes assessed and collected by the Commonwealth, alleged to have been illegally exacted.

Wherefore, the defendant says that this action is in substance and effect a suit against the Commonwealth of Massachusetts, and is therefore, not within the jurisdiction of this court.

II.

Without waiving the foregoing denial of the jurisdiction of this court, the defendant makes answer to the allegations of the plaintiff's writ and declaration as follows:

1. He denies each and every allegation in the plaintiff's writ and declaration contained.

2. And further answering, he says that this action was not brought within three months from the date of the payment of the taxes therein described, as required by St. 1909, c. 490, pt. II, §88.

3. And further answering, he says that the defendant is, and on or about October 1, 1918, was, the duly elected Treasurer and Receiver-General of the Commonwealth of Massachusetts; that, as such Treasurer and Receiver-General, it was his duty to collect and receive all sums of money due the Commonwealth on account of taxes lawfully assessed and payable to it, particularly including all taxes assessed upon foreign corporations under St. 1909, c. 490, pt. III, §56, and Gen. St. 1918, c. 253; that at some time prior to October 1, 1918, a tax under the provisions of Gen. St. 1918, c. 253, in the sum of $1,591.17, was assessed by the Tax Commissioner of the Commonwealth upon the plaintiff; that on or prior to October 7, 1918, a tax in the sum of $180, under the provisions of St. 1909, c. 490, pt. III, §56, was assessed by the Tax Commissioner of the Commonwealth upon the plaintiff; that on October 1, 1918, said sum of $1,591.17, and on October 7, 1918, said sum of $180, in payment of such taxes so assessed, were voluntarily paid to the defendant solely in his capacity of Treasurer and Receiver-General of the Commonwealth, and not otherwise, without protest and without any threats, compulsion or duress by the defendant or any other person and without the issuance of any legal process for enforcing such payment; that on December 5, 1918, in consequence of a decision of the Supreme Judicial Court of Massachusetts in the case of American Printing Company v. Commonwealth, 231 Mass. 237, there was repaid to the plaintiff by the defendant, out of the treasury of the Commonwealth, the sum of $1,065.23, as a part of the tax assessed under Gen. St. 1918, c. 253, determined to have been illegally assessed; that the balance of said first-mentioned tax and full amount of said second-mentioned tax were paid by the defendant into the treasury of the commonwealth of Massachusetts as a part of the general revenue of the Commonwealth and have now been expended by it for general public purposes; that neither of said taxes is in any respect unconstitutional or void; that said sums never came into the hands of the defendant personally but were thus received and paid into the treasury of the Commonwealth in his behalf by a receiving teller or clerk in the employ of the Commonwealth, whose duty it was to receive such payments in behalf of the Commonwealth; that the defendant, except as a public officer of and in behalf of the Commonwealth, as aforesaid, has at no time received any sum of money from the plaintiff, as alleged in the declaration or otherwise, and owes the plaintiff nothing; that if on the facts stated in the declaration any debt or obligation to the plaintiff at any time arose it is or was a debt or obligation of the Commonwealth of Massachusetts, and not of this defendant; that there is no provision of law authorizing suits to be brought against the defendant as Treasurer and Receiver-General in any court on account of debts or obligations of the Commonwealth and no provision of law authorizing him as such Treasurer and Receiver-General to pay out of the treasury of the Commonwealth any judgment that

may be entered in this case or to reimburse himself from such treasury for any payment on account of any such judgment made by him out of his personal funds.

Wherefore, the defendant says that the plaintiff cannot maintain this action against him.

By His Attorney, WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

This cause was thence continued to the March Term, A. D. 1919 when, to wit, May 13, 1919, the following Plaintiff's Amended Declaration was filed and allowed by consent:

8 *Plaintiff's Amended Declaration.*

(Filed and allowed by consent May 13, 1919.)

Now comes the plaintiff in the above entitled action and says that the defendant owes it the sum of four thousand and ninety-five and 39/100 dollars, according to the account hereto annexed and marked "A."

JOHN L. WHITING—J. J. ADAMS COMPANY.
By Its Attorneys,
CHARLES A. SNOW.
WILLIAM P. EVERTS.

Account Annexed.

"A."

Item 1.—To money had and received by the defendant to the plaintiff's use for or because of foreign corporation excise taxes levied by the defendant against and upon the plaintiff under the alleged authority of Massachusetts Acts 1909, c. 490, Part 3, Section 56 and Acts 1918, c. 253, the excise taxes levied under said Acts and each of them being unconstitutional and void under the "commerce" and "due process" clauses of the Federal Constitution and under the State Constitution and having been unlawfully exacted and collected from the plaintiff by the defendant through duress threats and compulsion.

Of the said excise taxes 480 dollars was exacted and collected on October 7, 1918, purporting to be levied under the said Act of 1909 and 4,591.17 dollars on or about October 1, 1918, purporting to be levied under the said Act of 1918, the latter being called an "income tax" $5,671.17

Credit by amount previously refunded by the Commonwealth 1,065.23

Balance due $4,005.94

Item 2.—To interest on same to date of writ from the dates when said excises referred to in Item 1, respectively were unlawfully exacted and collected from the plaintiff by the defendant, as stated in Item 1, through duress, threats and compulsion, and when repayment thereof was demanded.....	$89.45
Item 3.—Total.....	$4,095.39

On the said thirteenth day of May, the following Stipulation Waiving Jury Trial was filed

Stipulation Waiving Jury Trial.

(Filed May 13, 1919.)

The parties to the above entitled action hereby make and file with the Clerk of the Court their stipulation and agreement in writing waiving a jury.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Attorneys for Plaintiff.

WM. HAROLD HITCHCOCK,
Attorney for Defendant.

Also on the said thirteenth day of May, the following Agreed Facts was filed:

Agreed Facts.

(Filed May 13, 1919.)

(MEMORANDUM.—Copy of Agreed Facts is here omitted, as it forms part of the Bill of Exceptions, and will be found hereafter recorded. James S. Allen, Clerk.)

Thereupon, to wit, May 13, 1919, this cause came on to be heard on the foregoing Agreed Facts, without a jury, together with the case entitled No. 1060, Law, International Paper Company v. Charles L. Burrill, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting.

Also, on the same day, Requests for Rulings were filed by plaintiff.

This cause was thence continued under advisement from term to term to the September Term, A. D. 1919, when, to wit, September 19, 1919, a Memorandum of Decision was filed, ordering judgment to be entered for the defendant, with costs.

On the ninth day of October, A. D. 1919, a draft Bill of Exceptions was filed by the plaintiff.

This cause was thence continued from term to term to the present March Term, A. D. 1920, when an Amended Bill of Exceptions is filed, said Amended Bill of Exceptions being filed on the 26th day

of March, A. D. 1920, and allowed by the court on the 27th day of said March.

Thereupon, to wit, June 21, 1920, the Honorable George
10 W. Anderson, Circuit Judge, sitting as aforesaid, judgment is entered on the finding of the court, for the defendant, with costs taxed at——.

11 *Plaintiff's Amended Bill of Exceptions.*

(Filed March 26, 1920; Allowed March 27, 1920.)

Be it remembered that afterwards, to wit, on the thirteenth day of May, in the year of our Lord one thousand nine hundred and nineteen, at a stated term of the said court, begun and holden at Boston, in and for the District of Massachusetts, before his Honor, George W. Anderson, Circuit Judge, the issue joined in the above entitled cause between the said parties came on to be tried before the said Judge without the intervention of a jury, the parties aforesaid, by their counsel, having, according to the statute in such case made and provided, waived a jury, the plaintiff being represented by Charles A. Snow, Esq., and William P. Everts, Esq., as its attorneys and counsel, and the defendant by William H. Hitchcock, Esq., as his attorney and counsel; and upon the trial of the issue the attorneys of the said John L. Whiting—J. J. Adams Company, plaintiff, in order to make, maintain, and prove the said issues on its part, introduced in evidence the following "agreed facts," the same having been agreed upon by both parties, for the purposes of this case, without prejudice to the right of either party to introduce further evidence and to request rulings of law, as follows, namely:

12 *Agreed Facts.*

"It is hereby agreed that the following facts, may be taken as admitted facts, for the purposes of this case, subject to the right of either party to present further evidence and to request rulings of law.

The plaintiff is a foreign corporation transacting here both interstate and local business in conjunction.

The defendant is and was, at the times herein referred to, the Treasurer and Receiver-General of the Commonwealth of Massachusetts, and in connection with the collection of the excises claimed to be recovered herein professed to act as such, under the authority of Massachusetts statutes (St. 1909, c. 490, pt. III, §56, and St. 1918, c. 253), purporting to levy such excises, and under the other sections of the same acts relating to such excises and the penalties for nonpayment thereof.

On October 3, 1918, the plaintiff, without request or demand other than such request or demand as may be implied by law submitted to the Tax Commissioner its certificate of condition, under the alleged requirements of St. 1909, c. 490, pt. III, §54, which certificate was

appproved by the Tax Commissioner on October 5th, and on that day a certificate issued that an excise tax of four hundred and eighty (480) dollars, under the provisions of the above-mentioned statute of 1909, was due. This statute professed to require that said excise should be paid to the Treasurer and Receiver-General of the Commonwealth at the time of filing the certificate of condition and before said certificate could be allowed to be filed.

On or about July 27, 1918, the plaintiff filed with the Tax Commissioner a return of its income, under the provisions of the act of 1918 above referred to, a copy of which is hereto annexed as "Exhibit A". Subsequently, on or about September 3, 1918, the plaintiff wrote to the Tax Commissioner a letter in explanation of that return, a copy of which is hereto annexed as "Exhibit B". Thereupon, under the provisions of said act of 1918, the Tax Commissioner assessed a tax upon the plaintiff of four thousand, five hundred ninety-one and 17/100 (4,591.17) dollars, and duly notified it of the amount thereof in accordance with the provisions of said statute.

The total amount of these taxes was on October 7, 1918 paid by the plaintiff by its check. Check was payable to the order of the
13 Collector of Taxes of the Commonwealth. The said check was endorsed by a rubber stamp by the "Commonwealth of Massachusetts, by Charles L. Burrill, Treasurer and Receiver-General" and was deposited in a bank account standing in the name of the Commonwealth, from which funds could be withdrawn only through checks signed by the defendant as such Treasurer and Receiver-General or by the Deputy Treasurer and Receiver-General. If material, it is admitted that the defendant did not personally handle said check or use the rubber stamp in endorsing the same, but that these acts were done by J. C. Bond paying teller in the office of and appointed by the Treasurer and Receiver-General of the Commonwealth and also an employee of the Commonwealth, who acted in these respects in behalf of the said Treasurer. It is not claimed that the proceeds of this check went into the hands of or under the control of said Bond.

The above-mentioned check was deposited in the above account, together with other general revenue of the Commonwealth. It is not claimed that the defendant as Treasurer and Receiver-General of the Commonwealth, or individually now has in his possession any specific or identified fund in any manner representing said check or its proceeds.

This payment was made by the plaintiff without protest, but the plaintiff had within six months after the payment thereof filed a petition in the Supreme Judicial Court for the recovery of the tax paid August 10, 1916 and the tax paid August 10, 1917.

At the time the above-mentioned taxes became due and were paid the plaintiff had a place of business in this Commonwealth, where it manufactured its products. It manufactured no goods elsewhere but sold its good for delivery both in Massachusetts and in other States, a large part of such sales requiring transportation from Massachusetts and delivery in such other States. These local and interstate sales

were made by the use of the same places of business, agencies and instrumentalities.

14 As appears by its tax return the plaintiff owns real estate in the State of New York to the value of sixty thousand (60,000) dollars. Its income from this real estate was not included within its income taxable under the statute of 1918.

Subsequent to the payment of the above-mentioned taxes and on account of a decision of the Supreme Judicial Court of Massachusetts in the case of American Printing Co. v. Commonwealth, 231 Mass. 237, there was refunded to the plaintiff by the Treasurer and Receiver-General, as the result of action by the Board of Appeal created by the statute of 1909, the sum of one thousand, sixty-five and 23/100 (1,065.23) dollars, being one per cent of the amount of the excess profits tax paid by it to the Federal Government. Within six months from October 7, 1918, the plaintiff filed in the Supreme Judicial Court for the Commonwealth of Massachusetts within and for the County of Suffolk a petition for the recovery of each of said taxes under the provisions of St. 1909, c. 490, pt. III, §70, and Gen. St. 1918 c. 253, §4, incorporation Gen. St. 1918, c. 255, §7, which petition was pending in said court until January 31, 1919, when it was dimissed upon the motion of the petitioner, the plaintiff in this action without prejudice to further suits or proceedings to test the validity of the tax set forth in the petition. The said petition during that period was awaiting the final action of the Supreme Court in test cases, including one brought by this plaintiff, to determine the constitutionality of the statutes above referred to, and of the Massachusetts Court to determine the equity practice under such petition.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Attorneys for Plaintiff.

WILLIAM HAROLD HITCHCOCK,
Asst. Atty. Gen.,
For Defendant."

15 "EXHIBIT A."

THE COMMONWEALTH OF MASSACHUSETTS:

Additional Taxation of Foreign Corporations.

(General Acts 1918, Chapter 253.)

To be Returned to the Tax Commissioner on or Before July 1st, 1918.
Room 234, State House, Boston.

The amount of the annual net income must be identical with that given on the last return, covering one year, made to the Collector of Internal Revenue and as subsequently corrected by any authorized official of the United States.

Return of Net Income for the Fiscal Year Ended May 31st, 1918.

Penalty for Neglect or Failure to Make Report as Required or for Rendering False or Fraudulent Report.

Section 5. Any such company which fails to make any return required by the provisions of this act, or renders a false or fraudulent return, shall be liable to a penalty not less than one hundred dollars nor more than ten thousand dollars, to be paid to the commonwealth, and to be collected in a civil action brought in the name of the commonwealth in Suffolk County, and any person or any officer of any such company who makes a false or fraudulent return or statement with intent to defeat or evade payment of the tax required by the provisions of this act shall be fined not more than two thousand dollars or imprisoned not more than one year, or both.

Section 6. If any such company fails to render any return required by the provisions of this act, or renders a false or fraudulent return, the tax commissioner, according to the best information obtainable, shall make such return, according to the form prescribed, of the income liable to a tax, and shall lay such tax on the amount so determined, and in case of false or fraudulent return shall add one hundred per centum to such tax, or in case of failure to make a return, or to verify the same, he shall add fifty per centum to such tax. The amount so added to the tax shall be collected at the same time and in the same manner as the tax, unless such failure or falsity is discovered after the tax has been paid, in which case the tax so added shall be collected in the same manner as the tax. If such company fails to make such return or to permit an examination of its books, the tax commissioner may apply to the superior court for Suffolk County, or any judge thereof, for an order requiring such company to give such return, or to permit such examination. Said court or such judge, after such notice as it may find reasonable of the pendency of such application and hearing thereon, may make such order as it finds proper, and may punish for contempt the president, vice-president, treasurer, or assistant treasurer, and may restrain such company from further prosecution of its business until it has made such return, caused its officers or employees to give the information, or permitted the examination of its books, as the case may be. General Acts 1918, Chapter 255.

To the Tax Commissioner of Massachusetts:

1. (*a*) Statement of the John L. Whiting—J. J. Adams Company, Brush Manufacture.
   (*b*) Post office address 700 Harrison Ave. Boston, Mass.
   (*c*) The location of the principal office No. 700 Harrison Ave. Boston, Mass.
   (*d*) List of subsidiary companies and location of principal place of business of each: None.

If No Figures Are to be Extended Opposite Any Item in the Report, the Word "None" Should be Inserted.

(Figures Given Should Include Any Changes Made by Any Authorized Official of the United States.)

		Dollars.	Cts.
2.	Gross Income:		
	(*a*) From gross sales and other operations	$1,426,886	.58
	(*b*) From rentals, etc	1,650	.00*
	(*c*) From interest	2,277	.35
	(*d*) From dividends received	None	
	(*e*) From all other sources	1,545	.17
	(*f*) Total gross sales and other income	$1,432,359	.10
	Total deductions, (6c)	971,591	.64
7.	Net Income	$460,767	.46
	Deduct excess profits tax	106,523	.43
		$354,244	.03
		1,650	.00

		Dollars.	Cts.
3.	Deductions:		
	(*a*) Cost of goods and other property sold, and general expenses	$918,274	.31
4.	(*a*) Losses sustained charged off	912	.17
	(*b*) Depreciation charged off	None	
	(*c*) Depletion charged off	None	
5.	Total interest paid	35,061	.17
6.	(*a*) Taxes paid in Massachusetts not including income taxes	14,480	.70
	(*b*) Other taxes paid, not including income or excess profit taxes	2,863	.29
	(*c*) Total deductions	$971,591	.64

TAX COMMISSIONER.

July 27, 1918.

Net income as on Federal returns less amount below.. $352,594.03 at 1%

8. "If the corporation carries on business outside of this Commonwealth, or owns property beyond its jurisdiction, or is to any extent engaged in interstate or foreign commerce," state the amount of net income as is not derived from such sources. Explain fully by letter how this amount is determined.

Federal Income tax paid Nov. 9, 1917 = $4,663.40, 00.*

Deduct rentals from Real Estate in New York $1,650. not deducted above.

Section 2. If the amount of the net income as returned by each such company to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by other official of the United States, such company within ten days after the receipt of notification of such change or correction shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. In case a corporation fails to file the return within the time prescribed, there shall be added to, and become a part of the tax, as an additional tax, the sum of five dollars for every day during which such corporation is in default. If any deduction is made from the net income as returned, the tax commissioner shall certify to the auditor the amount of any tax paid upon such deduction, and the treasurer and receiver general shall pay said amount without any further act or resolve making appropriation therefor, or if any addition is made, such company shall within thirty days after receipt of notice from the tax commissioner of the amount of such addition pay the tax thereon. General Acts 1918, Chapter 253.

Question 8 (*a*) to 9 (*b*) inclusive are required to be answered only by companies carrying on business outside of Massachusetts. (Answer Yes or No.)

8. (*a*) Are the profits principally from the ownership, sale or rental of real estate? ——

(*b*) Are the profits principally from the sale or use of tangible personal property? ——

(Tangible personal property includes merchandise, machinery, materials, etc., and excludes cash on hand or on deposit, accounts receivable, patent rights, good will, shares of stock, bonds, notes and other choses in action.)

(*c*) Are the profits principally from the holding or sale of intangible property?

(Intangible personal property includes incorporeal property such as cash on hand or on deposit, accounts receivable, patent rights, good will, shares of stock, bonds, notes and other choses in action.)

Companies deriving profits principally from ownership, sale or rental of real estate or sale or use of tangible personal property are required to answer questions 8 (*d*) and 8 (*e*) provided they owned such property outside of Massachusetts on date of close of fiscal year.

(*d*) Fair cash value of real estate and tangible personal property in each city or town in this Commonwealth on date of close of fiscal year:

(No Deduction to be Made on Account of Any Incumbrance Thereon.)

City or Town.	Value.	City or Town.	Value.	City or Town.	Value.
.....	$.....	.....	$.....	.....	$.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

Total $.....

(*c*) Fair cash value of real estate and tangible personal property located outside of this Commonwealth on date of close of fiscal year:

(No Deduction to be Made on Account of Any Incumbrance Thereon.)

Location.	Value.	Location.	Value.	Location.	Value.
Real Estate Brooklyn New York	$60,000.00	.....	$....	.....	$....
.....	.....	.....	.....	.....	.....
Total					$60,000.00

Companies deriving profits principally from the holding or sale of intangible property are required to answer questions 9 (*a*) and 9 (*b*).

9. (*a*) Gross receipts from business carried on within Massachusetts..... $.....

(*b*) Gross receipts from business carried on outside of Massachusetts..... $.....

General Instructions and Information.

The word "year" as used in this blank refers to calendar or fiscal year which was used as the basis of the report to the internal revenue collector.

"Principal office" is the office of the company in which are kept the books of account, papers and other data from which the return is prepared.

Signatures and affirmation.—Returns must be sworn to or affirmed by the treasurer or assistant treasurer, and must be sworn to before an officer authorized to administer oaths. The seal of the attesting officer, if he is required to have a seal, must be impressed on the return in the space provided for that purpose.

Time for filing returns.—Returns are required to be filed on or before July first, unless fiscal year ends between April 30 and July 1, in which case report is due within sixty days after close of such fiscal year.

Date when tax is due.—The tax of one per centum on the net income as determined is payable on or before the first day of October, 1918. Statement of amount of tax due will be mailed to each corporation in September, 1918, but failure to receive statement will not excuse non-payment of tax.

Reports are treated as absolutely confidential by the officers and employees of the Commonwealth, and a fine or imprisonment sentence is provided for violation of provisions concerning disclosure of information by such persons.

Inasmuch as the clerical work attached to the verification, computation, etc., of the tax on the several thousand corporations is exacting, the receipt of this return on as early a date as possible will be greatly appreciated.

I, the treasurer (or assistant treasurer) of the above-named company whose return of net income is herein set forth, being duly sworn, depose and say that the items of said net income as herein set forth are a true copy of such items as were included in its last return made to the collector of internal revenue of the annual net income arising or accruing from all sources in its fiscal or calendar year next preceding, or of such annual net income as it has been changed or corrected by an authorized official of the United States, and further that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to my best knowledge and belief and from such information as I have been able to obtain, true and correct in each and every particular.

(Signed) HENRY H. HASCY,
Assistant Treasurer.

Sworn to and subscribed before me this 25th day of July 1918.

[Seal of Officer Taking Affidavit.]

(Signed) EDWARD M. HILL,
Notary Public.

16 EXHIBIT B."

(Letter-head of John L. Whiting—J. J. Adams Co.)

Sept. 3, 1918.

Wm. D. T. Trefry, Tax Commissioner,
State House,
Boston, Mass.

DEAR SIR:

Att. Alfred E. Taylor, 1st Clerk.

In reply to your letter of August 27th regarding our report of Net Income for the fiscal year May 31, 1918, we give you the following explanation.

Total net income, Item 7, we stated as $460,767.46. Of this amount $1,650 was derived from rentals of property situated in New York, which was entered by us in Item 8 of your blank. The remainder, therefore, $459,117.46 was derived from business carried on in Massachusetts.

Again the amount taxable at 1% after deducting excess profits tax would be $352,594.03, unless you decide to deduct $4,663.40 of Federal Income tax paid by us in this fiscal year, and which you will find noted in Item 8 of your blank. Please let us know if we are not entitled to such a deduction.

Should you desire an answer to Question 8-*d*, we hereby state that the value of our tangible property in Boston on May 31, 1918 was $1,800,716.19. We have no tangible property in any other city or

town in Massachusetts. The value of real estate owned by us in Brooklyn, N. Y., is, as stated in your blank, $60,000. It occurs to us now, however, as if this item of $60,000 which we have entered under Clause 8-*d* should be written under 8-*c*, and under 8-*d* we perhaps should have entered the value of tangible property in Boston as $1,800,716.19. These two entries, however which seem to be on the wrong lines would not affect our tax.

Trusting this will give you the information wanted, we remain

Yours respectfully,

JOHN L. WHITING—J. J. ADAMS CO.
H. W. HASCY,
Treasurer.

17 The plaintiff thereupon duly requested the Court to make the several rulings of law set forth in its written requests for rulings handed to the said Judge, a copy of which, so far as now material, is as follows:

Plaintiff's Requests for Rulings.

Now comes the plaintiff and requests the Court to make the following rulings of law, namely:

1. The Massachusetts Acts of 1909 (c. 490, Part 3, Sec. 56) and 1918 (c. 253), in their "essential and practical operation", constituted a "system" of taxing foreign corporations.

2. The form of the legislation, whether composed of one or several statutes, or the characterization of the statutes, either by their express provisions or by the State Court, as not constituting a "system" of taxation, will be wholly disregarded by the Federal courts. Their combined practical effect, in actual operation is the sole test of the validity of the said Acts.

3. As parts of a "system" of taxation, if one of said Acts is unconstitutional, the other falls also.

4. When considered separately, the said Act of 1909 violates the "commerce" clause of the Federal Constitution, because, at the time when the excise thereunder was imposed, the $2,000 maximum limitation was no longer in force, as applied to the total excises exacted for the local privilege of transacting domestic and interstate commerce in conjunction. In practical operation and effect, the limitation has been "removed" by the passage of the Act of 1918, in substantially the same way as it was "removed" by c. 724 of the Acts of 1914 (since repealed), as held in International Paper Co. v. Massachusetts (246 U. S. 135).

5. Since the passage of the 1918 Act, the necessary effect of the 1909 Act is to reach the revenues from interstate business and thereby burden interstate commerce, even if that result is not also the propose of the said Acts, in combination.

6. Since the passage of the 1918 Act, if not before, the 1909 Act, by itself, taxes "property" beyond the limits of the taxing State, and is not a mere "measure" of taxation, as was erroneously held in Baltic Mining Co. v. Massachusetts (231 U. S. 68), which,
18 in this respect, must be regarded as overruled by International Paper Co. v. Massachusetts (supra). The 1909 Act, therefore, violates the "due process" clause of the Federal Constitution.

11. The provision that the remedy by petition in the State courts should be "exclusive" is of no consequence:

(1) Because it is unconstitution- and void, as part of the same statutes or as an incident to the same taxes declared unconstitutional in International Paper Co. v. Massachusetts (supra).

(2) Because said provision under the 1914 Act (Sec. 2) was expressly repealed on March 18, 1918 (St. 1918, c. 76).

12. Under the Federal Constitution, no State can limit citizens of another State to suits in the State Courts, where the Federal Courts otherwise have jurisdiction, by reason of diverse citizenship or otherwise.

14. The provisions of the Massachusetts statutes, relating to the assessment and collection of these excises, constitute implied duress.

15. Upon all the evidence, the plaintiff can recover.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Attorneys for Plaintiff.

The said Judge thereupon refused all the above requests
19 for rulings, and the plaintiff duly excepted to the refusal of the said Judge to rule as requested in the said requests.

And the said Judge thereupon ruled that the said Acts of 1909 and 1918 were constitutional under the provisions of the Federal Constitution and that the plaintiff could not recover the taxes herein and the plaintiff thereupon duly excepted to the rulings of the said Judge above stated.

The said Judge thereafter, on September 19, 1919, ruled and ordered that judgment be rendered for the defendant, with costs.

The plaintiff duly excepted to such ruling and order.

Wherefore, the plaintiff, being aggrieved by the foregoing rulings and refusals to rule, orders and directions of the said Judge, brings this, its bill of exceptions, and prays that the same may be allowed.

JOHN L. WHITING—J. J. ADAMS COMPANY,
By Its Attorneys and Counsel,
(Signed) CHARLES A. SNOW,
WILLIAM P. EVERTS.

May be allowed.

WM. HAROLD HITCHCOCK,
Atty. for Deft.

March 27, 1920.

Allowed:
G. W. ANDERSON,
U. S. Circuit Judge.

20 *Memorandum of Decision.*

September 19, 1919.

ANDERSON, *J.*:

This is an action for money had and received, against the defendant personally, who is Treasurer of the Commonwealth of Massachusetts, to recover taxes paid by the plaintiff, a foreign corporation, without protest, on the theory that the statutes under which such taxes were levied and paid are unconstitutional. The case was heard by me without a jury, on agreed facts, together with the case of International Paper Company against the same defendant, No. 1060. But the issue in this case is entirely different from that in the International Paper Company case. The tax here involved was levied under the Massachusetts Statute of 1909, Chap. 490, Part III, Sec. 56, and the Statute of 1918, Ch. 253, enacted after the Supreme Court of the United States had, in March, 1918, decided in the case of International Paper Company v. Massachusetts, 246 U. S. 135, that the system of taxation grounded upon said statute of 1909 and the statute of 1914, Ch. 724, was unconstitutional. No court has yet held this new statute of 1918 unconstitutional. In my view, except under very extraordinary—almost inconceivable—circumstances, no court of first instance should hold a legislative Act unconstitutional.

I therefore rule that the tax in question was levied and paid under valid laws of Massachusetts, and consequently find for the defendant. Judgment for the defendant, with costs.

21 *Plaintiff's Petition for Writ of Error.*

(Filed July 6, 1920.)

And now comes the John L. Whiting—J. J. Adams Company, the plaintiff herein, and says that on the 21st day of June, 1920, the District Court of the United States for the District of Massachusetts, entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this action certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, to the end that the errors so complained of may be corrected and the said judgment reversed, and that a transcript of the record, proceedings and papers in this case duly authenticated, may be sent to the Supreme Court of the United States.

JOHN L. WHITING—J. J. ADAMS COMPANY,

By

CHAS. A. SNOW.
WM. P. EVERTS.

Plaintiff's Assignment of Errors.

(Filed July 6, 1920.)

And now comes the plaintiff in error (the original plaintiff) and with his petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in that the District Court erred in refusing certain of the plaintiff's requests for rulings herein specified and in the other respects herein set forth, namely

1. In refusing to rule (as requested, in substance, in the 1st to 5th requests) that the Massachusetts Acts of 1909 (c. 490, Part 3, Sec. 56) and of 1918 (c. 256) are unconstitutional and void, because they and each of them violate the "commerce" clause of the Federal Constitution.

2. In refusing to rule (as requested in the 1st and 2nd requests) that the said Acts constitute a "system" of taxation, that, if one is unconstitutional, the other fails also; and that their combined
22 practical effect, in actual operation, is the sole test of their validity.

3. In refusing to rule (as requested in the 4th request) that the $2,000 maximum limitation in the said 1909 Act, in its practical operation and effect, was "removed" by the passage of said Act of 1918 in the same way as it was "removed" by c. 724 of the Acts of 1914, as held in International Paper Co. v. Massachusetts (246 U. S. 135).

4. In refusing to rule (as requested in the 15th request) that upon all the evidence the plaintiff may recover.

JOHN L. WHITING—J. J. ADAMS COMPANY,
Plaintiff.
By Its Attorneys,
CHAS. A. SNOW,
WM. P. EVERTS.

Bond on Writ of Error.

(Filed July 8, 1920; Approved July 14, 1920.)

Know all men by these presents, That we, John L. Whiting—J. J. Adams Co., as principal, and Fidelity and Deposit Company of Maryland, a corporation duly organized under the laws of the State of Maryland, and having a usual place of business in Boston, Massachusetts, as surety, are held and firmly bound unto Charles L. Burrill, in the full and just sum of two hundred fifty dollars to be paid to the said Charles L. Burrill, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this e-venth day of July in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit depending in said Court between John L. Whiting—J. J. Adams Co. and Charles L. Burrill judgment was rendered against the said John L. Whiting—J. J. Adams Co. and the said John L. Whiting—J. J. Adams Co. having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles L. Burrill, citing and admonishing him to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the fifth day of August, 1920.

Now, the condition of the above obligation is such, That
23 if the said John L. Whiting—J. J. Adams Co. shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN L. WHITING—J. J. ADAMS CO., [SEAL.]
Per WM. P. EVERTS,
Atty.
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By
A. A. DORITY,
Attorney-in-Fact.

Sealed and delivered in presence of
A. M. BRADY.

Approved:
G. W. ANDERSON,
Cir. Judge.

24 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles L. Burrill, a resident, citizen and inhabitant of Boston, in the County of Suffolk and Commonwealth of Massachusetts, in our District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the fifth day of August next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts, wherein John L. Whiting—J. J. Adams Company, a corporation duly established and existing under the laws of Maine and having an usual place of business in Boston, in the County of Suffolk, in the Commonwealth and District of

Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George L. Anderson, Circuit Judge duly assigned to hold the District Court of the United States for the District of Massachusetts this — day of July, in the year of our Lord one thousand nine hundred and twenty.

G. L. ANDERSON,
U. S. Circuit Judge.

25 *Acknowledgment of Service of Citation on Writ of Error.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

July 16, 1920.

Service of the within citation is hereby accepted.

WM. HAROLD HITCHCOCK,
Attorney for Deft.-in-Error.

26 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, John E. Gilman, Jr., Deputy Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entiled, No. 1061, Law Docket, John L. Whiting—J. J. Adams Company, Plaintiff v. Charles L. Burrill, Defendant, in said District of Court determined, Plaintiff's Amended Bill of Exceptions, the Memorandum of Decision, dated September 19, 1919, the Petition for Writ of Error, the Assignment of Errors, the Bond on Writ of Error, and also the original Citation on Writ of Error issued in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this 26th day of July, A. D. 1920.

[Seal of the United States District Court of Massachusetts.]

JOHN E. GILMAN, JR.,
Deputy Clerk.

Endorsed on cover: File No. 27,818. Massachusetts D. C. U. S., term No. 461. John L. Whiting—J. J. Adams Company, plaintiff in error, vs. Charles L. Burrill, treasurer and receiver general of the Commonwealth of Massachusetts. Filed July 30th, 1920. File No. 27,818.

Supreme Court of the United States

OCTOBER TERM, 1921

No. 98

CHARLES L. BURRILL, PLAINTIFF IN ERROR

v.

LOCOMOBILE COMPANY

No. 99

CHARLES L. BURRILL, PLAINTIFF IN ERROR

v.

RUSSELL MILLER MILLING COMPANY

In Error to the District Court of the United States for the District of Massachusetts

---

BRIEF FOR PLAINTIFF IN ERROR

WM. HAROLD HITCHCOCK

Attorney for Plaintiff in Error

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Supreme Court of the United States

October Term, 1921.

No. 98.

CHARLES L. BURRILL, PLAINTIFF IN ERROR,

v.

LOCOMOBILE COMPANY.

No. 99.

CHARLES L. BURRILL, PLAINTIFF IN ERROR,

v.

RUSSELL MILLER MILLING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

These are two writs of error to the District Court of the United States for the District of Massachusetts to reverse judgments for $3,133.91 and $2,877.20, respectively, entered by that Court against the plaintiff in error in two actions at law brought against him by

the defendants in error. The plaintiff in error will be hereafter referred to as the defendant and the defendants in error as the plaintiffs.

The defendant was Treasurer and Receiver-General of the Commonwealth of Massachusetts from January 20, 1915, to January 21, 1920. These actions are in the form of actions of contract for money had and received and were brought against him by the plaintiffs to recover from him personally certain excise taxes paid into the treasury of Massachusetts by the plaintiffs while he was in office. The declaration in each case alleges that these excises were unconstitutional and void and were collected by the defendant through duress, threats and compulsion. The claim from the outset has been that these excises were in violation of the Federal Constitution under the decisions of this Court in International Paper Co. *v.* Massachusetts, 246 U. S. 135, and Locomobile Company *v.* Massachusetts, 246 U. S. 146.

The cases were heard together upon agreed facts before Anderson, J., without a jury. The essential facts were as follows:—

LOCOMOBILE COMPANY.

On April 24, 1916, and April 24, 1917, this plaintiff, in accordance with the requirements of the statutes of Massachusetts, submitted to the Tax Commissioner of the State without request or demand by him its certificate of condition. The Tax Commissioner on each occasion at once approved the certificate and assessed an excise tax of $1,300 under St. 1909, c. 490, Pt. III, sect. 54, this amount being one-fiftieth of one per cent of the par value of the authorized capital

stock of the corporation. The Locomobile Company on the days of their respective assessments paid these taxes at the office of the State Treasurer by checks payable to the order of the Treasurer of the Commonwealth of Massachusetts. These checks were transmitted to the office of the Treasurer by letters addressed to him which were opened either by him or by some authorized clerk. No protest of any sort was made by this plaintiff at the time of making either of these payments.

RUSSELL MILLER MILLING COMPANY.

On November 24, 1915, December 4, 1916, and December 13, 1917, the Russell Miller Milling Company submitted to the Secretary of the Commonwealth without request or demand by him its certificate of condition as required by the statutes of Massachusetts. On each of these days the Tax Commissioner of the Commonwealth approved the certificate of condition and assessed an excise tax upon this plaintiff of $800 under St. 1909, c. 490, Pt. III, sect. 54, being one-fiftieth of one per cent of the par value of its authorized capital stock.

These taxes were paid by this plaintiff at the office of the Treasurer on November 24, 1915, December 4, 1916, and December 13, 1917, in the following manner. Checks for the amount of each tax were mailed to the Secretary of the Commonwealth together with the certificates of condition, and were received in due course. These checks were payable to the order of the Treasurer of the Commonwealth of Massachusetts and were sent by the Secretary to the office of the Treasurer. Each check and certificate of condi-

tion was accompanied by a letter in the following form: —

BOSTON, Dec. 10, 1917.

Secretary of the Commonwealth, State House, Boston.

DEAR SIR: — I enclose for filing in your office the annual certificate of condition of the Russell Miller Milling Co., a foreign corporation, together with check for $5 filing fee.

I also enclose check for $800, for the foreign corporation excise due to accompany said certificate.

The said Company makes payment of said excise and files said certificate of condition under protest and duress, claiming that the said tax and the statutes compelling the filing of said certificate and the payment of said tax are unconstitutional and void and have no lawful application to said company.

Very truly yours,

(Signed) CHARLES A. SNOW,
Atty. for Russell Miller Milling Co.

(Record, No. 99, page 8.)

In the case of each of these corporations, at once upon the receipt of the checks at the office of the Treasurer and Receiver-General, they were endorsed "Commonwealth of Massachusetts, Charles L. Burrill, Treas." by a rubber stamp used by the Receiving Teller in the office of the Treasurer or by some other employee, and then deposited in a bank account standing in the name of the Commonwealth of Massachusetts, Charles L. Burrill, Treas., together with other general revenue of the Commonwealth. Checks upon this account and upon other bank accounts of the Commonwealth are signed either by the Treasurer and Receiver-General or by his deputy, and are then paid by the bank without further signature. The statute

egulating the method of paying money out of the Treasury of the Commonwealth will be hereafter referred to.

There is no evidence that the checks in either case r the fact that the payments in question were made ver came personally to the knowledge of the defendant, nor is there any evidence that the so-called tter of protest signed by the Russell Miller Milling ompany ever came to the knowledge of the defendant. he fact that the payments by this company were ade under protest was noted upon certain records n the office. The defendant knew that during the eriod covered by these payments certain foreign cororations were litigating in the courts of Massachutts the question of the validity of the taxes assessed pon them. It does not appear that he knew that ither plaintiff was contesting the validity of any taxes ssessed upon it.

Within six months after each of the aforesaid payents each plaintiff filed in the Supreme Judicial Court Massachusetts petitions for the recovery of each of e taxes now in question under the provisions of St. 909, c. 490, Pt. III, sect. 70. These petitions were ending in that court until January 31, 1919, when ter the decision by that Court in International Paper o. *v.* Commonwealth, 232 Mass. 7, they were disissed without prejudice. In view of the fact that it conceded (Record, No. 98, page 7, and No. 99, page that these petitions were awaiting the last mentioned ecision, the inference is plain that they were disissed because they were not properly brought under e Massachusetts statute as interpreted by that ecision.

No question is raised but that each of these corporations had a place of business in Massachusetts where they were carrying on a local business of some extent as distinguished from an inter-state business and that each corporation owned a large amount of real estate and other property outside of Massachusetts. (Record, No. 98, page 7; No. 99, page 8.)

Upon these facts the District Court ordered judgment for the plaintiff in each case for the total of the excise taxes paid as set forth in the agreed facts with interest from the date of payment, refusing to grant certain requests for rulings (No. 98, page 8; No. 99, page 10) submitted by the defendant. The latter's bill of exception to this refusal was allowed in each case, judgment entered, and a direct writ of error to this Court allowed.

STATUTES.

Mass. St. 1909, c. 490, Part III.

"Section 54. *Every foreign corporation shall annually*, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting but not more than three months after the date so fixed for said meeting, *prepare and file in the office of the secretary of the commonwealth*, upon payment of the fee provided in section ninety-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, *a certificate* signed and sworn to by its president, treasurer, and by a majority of its board of directors, *showing the amount of its authorized capital stock, and its assets and liabilities* as of a date not more than ninety days prior to said annual meeting in such form as is required of domestic business corporations under the provisions of section forty-five of said chapter, and the change or changes, if any, in the other particulars in

uded in the certificate required by section sixty of said chap-
r, made since the filing of said certificate or of the last
nnual report.

SECTION 55. A certificate which is required to be filed by
e preceding section shall be accompanied by a written state-
ent under oath by an auditor, as provided in section forty-
even of chapter four hundred and thirty-seven of the acts of
e year nineteen hundred and three, except that such auditor
all in all cases be chosen by the board of directors. Before
is filed it shall be submitted to the commissioner of corpora-
ons, who shall examine said certificate and shall as tax com-
issioner assess upon the corporation an excise tax in accord-
nce with the provisions of the following section. If he finds
at the certificate is in compliance with the requirements of
e preceding section, he shall indorse his approval thereon;
t no certificate shall be filed until he has indorsed his ap-
oval thereon, and until the excise tax required by the follow-
g section has been paid to the treasurer and receiver-general.

SECTION 56. *Every foreign corporation shall, in each year, at
e time of filing its annual certificate of condition, pay* to the
easurer and receiver-general, for the use of the commonwealth,
n excise tax to be assessed by the tax commissioner *of one
ieth of one per cent of the par value of its authorized capital
ock* as stated in its annual certificate of condition; *but the
mount of such excise tax shall not in any one year exceed the
m of two thousand dollars.*

SECTION 58. If a domestic business corporation fails to file
s tax return before the tenth day of May of each year, or if a
reign corporation omits to file the certificate as required in
ction fifty-four, the tax commissioner shall give notice by
ail, postage prepaid, to the corporation of its default, directed,
n the case of a foreign corporation, to the resident manager, if
ny in the United States, or to any other person designated by
he corporation, by written notice filed in the office of the com-
issioner, as provided in section fifty-nine of chapter four
undred and thirty-seven of the acts of the year nineteen hun-

dred and three for notice of the service of legal process, wh
notice to said foreign corporation shall contain a copy of t
section and of sections sixty-five to sixty-eight inclusive of
chapter. If such business or foreign corporation fails to
such return or certificate within thirty days after such notic
default has been given or mailed, it shall forfeit to the comm
wealth not less than five nor more than ten dollars for each
for fifteen days after the expiration of the said thirty days, a
not less than ten nor more than two hundred dollars for e
day thereafter during which such default continues, or any ot
sum, not greater than the maximum penalty or forfeiture, wh
the court may deem just and equitable, which, in the case
foreign corporation, shall be recovered as herein provided.

Penalties and forfeitures incurred by any domestic busines
foreign corporation which, being subject to the provisions
this act, omits to cause any certificate or return which may
required by the provisions of sections forty and fifty-four to
duly filed may be recovered in an action brought in the cou
of Suffolk in the name of the commonwealth, or they may
recovered by an information in equity in the name of the att
ney-general at the relation of the tax commissioner, brought
the supreme judicial court in the county of Suffolk. Upon s
information, the court may issue an injunction restraining t
further prosecution of the business of the corporation nam
therein until such penalties or forfeitures, with interest a
costs, have been paid, and until the returns and certifica
required by this act have been filed.

SECTION 69. When a tax or excise of any kind remains d
to or is claimed by the commonwealth from a corporati
company or association, whether existing by authority of t
commonwealth or otherwise, except a municipal corporati
for ten days after notice given through the mail by the tre
urer and receiver-general to its treasurer or other financ
agent that such tax or excise is due and unpaid, the tre
urer and receiver-general may, in addition to other mo
of relief, issue his warrant, directed to the sheriff or his deput

of the county in which such corporation, company or associa-
tion has its place of business, commanding the collection of
such tax or excise. Such warrant may be substantially in
the form of and served in the same manner as those issued
by the assessors of towns. Such warrant shall not run against
the body of any person, nor shall any property of such delin-
quent corporation, company or association be exempt from
seizure and sale thereon. The officer having such warrant
shall collect such tax or excise, and interest upon the same
at the rate of twelve per cent per annum from the time when
such tax or excise became due, and may collect and receive
for his fees the sum which an officer would be entitled by
law to receive upon an execution for a like amount. He shall
also collect one dollar for the warrant, which shall be paid
over to the treasurer and receiver-general.

SECTION 70. Any corporation or association aggrieved by
the exaction of said tax or excise or of any portion thereof
may, within six months after the payment of the same, whether
such payment be after or before the issue of the warrant men-
tioned in the preceding section, apply by petition to the su-
preme judicial court, setting forth the amount of the tax or
excise and costs thereon so paid, the general legal grounds
and the specific grounds in fact, if any, upon which it is claimed
such tax or excise should not have been exacted. Said peti-
tion shall be the exclusive remedy and shall be entered and
heard in the county of Suffolk. A copy of the same shall be
served upon the treasurer and receiver-general and upon the
attorney-general. The proceedings upon such petition shall
conform, as nearly as may be, to proceedings in equity, and
an abatement shall be made of only such portion of the tax
or excise as was assessed without authority of law. In case
said tax or excise has heretofore been exacted or is hereafter
exacted in consequence of any law or statute of any other
state of the United States, then the application above pro-
vided for may be made at any time within six years after the
exaction of said tax or excise or any portion thereof.

SECTION 71. If the court, upon a hearing or trial, adjudges that said tax or excise, and the costs thereon, have been illegally exacted, a copy of the judgment or decree shall be transmitted by the clerk of the court to the auditor, who shall thereupon audit and certify the amount adjudged to have been illegally exacted, with interest, and costs to be taxed by the clerk of the court in the same manner as other claims against the commonwealth, and the treasurer and receiver-general shall pay the same, without any further act or resolve making appropriation therefor. So much thereof as has been paid from the treasury of the commonwealth to any city or town may be deducted from and set off against any sum afterwards payable to such city or town."

MASS. ST. 1914, C. 724, §§ 1 AND 2.

"SECTION 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition.

SECTION 2. All laws now or hereafter in force relating to the assessment and collection of the tax imposed by said section fifty-six and all laws providing for appeal from any assessment made under said section fifty-six or for the recovery of any tax assessed thereunder shall, except so far as they are inconsistent with the provisions of this act, apply to the tax imposed by this act."

Mass. Gen. St. 1918, c. 76.

"Section 1. Chapter seven hundred and twenty-four of the acts of nineteen hundred and fourteen is hereby repealed.

Section 2. This act shall take effect upon its passage. *Approved March 18, 1918.*"

SPECIFICATIONS OF ERROR.

The defendant assigns as error in the case of the Locomobile Company (No. 98, Record, page 11) the refusal of the Court to rule in accordance with his requests as follows:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. The taxes for the recovery of which this action is brought were in all respects constitutional and valid.

3. The decision in Locomobile Co. *v.* Massachusetts, 246 U. S. 146, being based upon a misconception of the construction given by the Massachusetts Supreme Judicial Court to Statute 1909, Chap. 490, Part III, Sect. 56, and Statute 1914, Chap. 724, in their combined operation as appears from the subsequent decision of that Court in Liquid Carbonic Co. *v.* Commonwealth, 232 Mass. 19, and Lawton Spinning Co. *v.* Commonwealth, 232 Mass. 28, is not binding in this case upon the question of the validity of the taxes herein involved.

4. As Statute 1909, Chap. 490, Part III, Sect. 56, is held by the Massachusetts Supreme Judicial Court to be in all respects separate and severable from Statute 1914, Chap. 724, and as the taxes here involved have been assessed solely under the former statute which has been held valid by the Supreme Court of

the United States (Baltic Mining Co. *v.* Massachusetts, 232 Mass. 68; Cheney Bros. Co. *v.* Massachusetts, 246 U. S. 147), such taxes are in all respects valid.

5. Any personal common law liability otherwise existing on the part of the defendant for taxes paid to him as Treasurer and Receiver-General of the Commonwealth by any corporation has been entirely removed and repealed by Statute 1909, Chap. 490, Part III, Sect. 70, and therefore this suit cannot be maintained against him.

6. There being no evidence that any of the sums paid by the plaintiff ever came under the personal control of the defendant, he is not liable in this action for any sums paid by the plaintiff as shown by the evidence.

7. There being no evidence that at the time of the payment of any of the taxes involved in this case the plaintiff gave notice to the defendant that it proposed to hold him personally liable therefor, this action cannot be maintained.

8. It appearing that all the taxes involved in this case were paid by the plaintiff without protest of any sort made at the time of such payment, this action cannot be maintained.

9. On the evidence in this case all payments made by the plaintiff were voluntary payments made without fraud or duress by the defendant or by any one for whose acts he is responsible, therefore this action cannot be maintained.

He also assigns error in the following rulings actually made by the Court:

10. In that the Court ruled that the taxes paid by the plaintiff to the defendant as set forth in the agreed statement of facts were illegal and void as being in violation of the Constitution of the United States.

11. In that the Court ruled that as against this plaintiff the provisions of Massachusetts Statute 1909, Chap. 490, Part III, Sect. 56, were at the date of the payment of the taxes described in the agreed statement of facts void as being in violation of the Constitution of the United States.

12. In that the Court found for the plaintiff upon the facts set forth in the agreed statement of facts.

In the Russell Miller Milling Company case (No. , Record, page 9), the defendant assigns the refusal of the Court to give in this case rulings in the same form the rulings 1 to 7 and 9 in the Locomobile Company case and as ruling 8 the following:

"8. The protest made by the plaintiff at the time of the payment of the various taxes involved in this case was not a sufficient notice to the defendant that it proposed to hold him personally liable for those payments, and therefore this action cannot be maintained."

ARGUMENT.

I.

Jurisdiction of this Court.

Federal Judicial Code, Sect. 238, 36 Stat. L., provides for a direct writ of error to this Court, among others, in the following cases:

"(3) In any case that involves the construction and application of the Constitution of the United States.

"(5) In any case in which the Constitution or law of a Stat
is claimed to be in contravention of the Constitution of th
United States."

The plaintiffs' claims in both of these cases are base
upon the assertion that the excise taxes which the
seek to recover are invalid in that they violate th
Commerce clause of the Federal Constitution and th
due process clause of the Fourteenth Amendment
thereto. It is asserted that the Massachusetts Statute
in accordance with which these taxes were assessed
violate these provisions of the Federal Constitution.
The cases plainly therefore come within the specific
language above quoted giving this Court jurisdiction
to review a judgment of the District Court upon a
direct writ of error to that court.

In the cases at bar the jurisdiction of the District
Court is based both upon diverse citizenship and upon
the alleged violation of the Federal Constitution. It
is well settled by the decisions of this court that in
such a case a judgment of the District Court may be
reviewed either by a direct writ of error to this court
or by a writ of error to the Circuit Court of Appeals at
the option of the appealing party.

Loeb *v.* Columbia Township, Trustees, 17
U. S. 472.
American Sugar Refining Co. *v.* New Orlean
181 U. S. 277.
Huguley Mfg. Co. *v.* Galeton Cotton Mil
184 U. S. 290.

It is also clearly established that when this court ha
once taken jurisdiction of a direct writ of error in su

a case, it will review not only the constitutional question upon which its jurisdiction is based, but all other questions properly presented by the record.

Boise Artesian, etc., Water Co. *v.* Boise City, 230 U. S. 84, 90.
Wilson *v.* United States, 230 U. S. 563.
Louisville, etc., Railway Co. *v.* Western Union Telegraph Co., 234 U. S. 369.

It thus follows that all questions of law presented by the record in these cases are properly before this Court.

II.

The Excise Taxes which the Plaintiffs seek to recover are not in Violation of the Federal Constitution.

Principles of Previous Decisions accepted.

The taxes which the Locomobile Company seeks to recover are of the same amount and are assessed under the same statute and under the same conditions as the tax against that company held by this Court to be invalid in Locomobile Co. *v.* Massachusetts, 246 U. S. 146. The taxes which the Russell Miller Milling Co. seek to recover are of precisely the same character. It is not, however, the purpose of the defendant to argue any of the constitutional questions which were involved in that decision and the case of the International Paper Co. *v.* Massachusetts, 246 U. S. 136, which it followed.

Question merely One of Application to Mass. Sts. as now

The sole question now presented relates to the application of those decisions to the taxes now in question in view of the construction of the Massachusetts statutes involved as laid down in decisions of the

construed.

Massachusetts Supreme Judicial Court, rendered since the decision of the last mentioned cases by this Court. The defendant's position is summarily stated in his third and fourth request for rulings in each of these cases as follows:

"3. The decision in Locomobile Co. *v.* Massachusetts, 246 U. S. 146, being based upon a misconception of the construction given by the Massachusetts Supreme Judicial Court to Mass. St. 1909, Chap. 490, Part III, Sect. 56, and Mass. St. 1914, Chap. 724, in their combined operation, as appears from the subsequent decision of that Court in Liquid Carbonic Co. *v.* Commonwealth, 232 Mass. 19, and Lawton Spinning Co. *v.* Commonwealth, 232 Mass. 28, is not binding in this case upon the question of the validity of the taxes herein involved.

4. As Statute 1909, Chap. 490, Part III, Sect. 56, is held by the Massachusetts Supreme Judicial Court to be in all respects separate and severable from Statute 1914, Chap. 724, and as the taxes here involved have been assessed solely under the former statute which has been held valid by the Supreme Court of the United States (Baltic Mining Co. *v.* Massachusetts, 232 U. S. 68; Cheney Bros. Co. *v.* Massachusetts, 246 U. S. 147), such taxes are in all respects valid."

History of Mass. Sts. in this Court.

The history of the Massachusetts statutes imposing excise taxes on foreign corporations, under which the taxes in question were assessed and paid, has so recently been before this Court that it need be stated only in outline.

St. 1909, c. 490, Pt. III, § 56 (*supra*, p. 7), imposed upon a foreign corporation doing business within the State "an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise

shall not in any one year exceed the sum of two sand dollars." This statute, interpreted as not ying to corporations engaged solely in interstate nerce, was fully sustained by this court in Baltic ng Company *v.* Massachusetts, 231 U. S. 68. It again sustained in its application to various cor- tions, conducting a variety of activities within the e other than interstate commerce, in Cheney hers Company *et al. v.* Massachusetts, 246 U. S.

1914 the following additional provision was ted (St. 1914, c. 724, § 1, *supra*, p. 10):

very foreign corporation subject to the tax imposed by n fifty-six of Part III of chapter four hundred and ninety e acts of the year nineteen hundred and nine shall in each at the time of filing its annual certificate of condition, o the treasurer and receiver general for the use of the com- ealth, in addition to the tax imposed by said section ix, an excise tax to be assessed by the tax commissioner e one-hundredth of one per cent of the par value of its rized capital stock in excess of ten million dollars as l in its annual certificate of condition."

International Paper Company *v.* Massachusetts, U. S. 135, this court had before it the validity tax of $5,500, based as to $2,000 upon the stat- f 1909 and as to $3,500 upon the statute of 1914. ooney *v.* Crane Company, 245 U. S. 178, argued decided after the argument of the last-mentioned this court had held invalid, as burdening inter- commerce and taxing property beyond the diction of the State, a tax upon a foreign corpora- measured by a percentage of total authorized al without limitation. Thus in International

International Paper Co. v. Mass., analyzed.

Paper Company *v.* Massachusetts, it simply had to apply to the facts and the statutes there involved the rule established in Looney *v.* Crane Company.

The total tax or taxes of $5,500 paid by the International Paper Company consisted of two elements, namely, $2,000 levied under the statute of 1909 and $3,500 levied under the statute of 1914. Before the enactment of the statute of 1914 the $2,000 tax was plainly valid under the Baltic Mining Company case, and thus the only new question, involved after the decision in Looney *v.* Crane Company, was whether, since the statute of 1914, the total exaction of $5,500 was invalid or only so much of it, that is, $3,500, as was levied under the statute of 1914. This was merely the question whether the total amount paid consisted of two taxes or of only one. In other words, were these elements of the total tax burden so separable that the exaction of $3,500 in excess of the maximum limit approved in the Baltic Mining Company case is alone invalid; or did the illegal exaction under the statute of 1914 so taint the valid tax of $2,000, imposed under the statute of 1909, that the corporation escaped all taxation? This question was plainly one of statutory construction in regard to which it is the settled practice of this court to follow the rulings of the state courts.

Only New Question Severability of Mass. Sts.

In dealing with this question of separability this court said in the International Paper Company case:

Assumed to have been held Severable by State Court.

"While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, its operation and validity must be determined here by considering it as a whole, for the opinion of the state court not only holds that the 'maximum limitation' put on the tax by the part first enacted is 'removed' by the other, but treats the two

s exacting a single tax based on the par value of 'the authorized capital' and computed as to ten million thereof at the rate of one-fiftieth of one per cent and he excess at the rate of one one-hundredth of one per

ard the end of the opinion the court further

e, the tax sustained in Baltic Mining Co. *v.* Massa- s was imposed under the first of the statutes now in n, the one of 1909; but at that time the statute placed mum limit on the amount of the tax which, as shown and other cases, was a material factor in the decision. mitation, as the state court holds, was 'removed' by tute of 1914, which also made a partial reduction in the e. Since then the tax has been assessed on the par f 'the entire authorized capital' at one-fiftieth of one t up to $10,000,000 and at one one-hundredth of one t for the excess."

ordingly, assuming that the State court had l these statutes as two component parts of a indivisible system of taxation imposing but x, this Court held the entire exaction invalid.

Same Assumption in Locomobile Co. v. Mass.

Locomobile Company *v.* Massachusetts, 246 146, decided at the same time, the sole ques- as as to the validity of a tax of $1,300, imposed e application only of the statute of 1909 but he enactment of the statute of 1914. In view assumption just stated as to the construction se statutes in their combined operation, the seems to have thought it necessarily followed his tax was invalid also. The Court in its opin- erely stated:

"The tax is of a designated per cent of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, Part III, § 56, was removed by St. 1914, c. 724, § 1. As thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1; Pullman Company *v.* Kansas, 216 U. S. 56; Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146, and Looney *v.* Crane Company, 245 U. S. 178. This we have just decided in International Paper Co. *v.* Massachusetts, *ante*, 135."

This Assumption Essential to Decisions.

Doubtless, this conclusion followed from the assumption made by the court in the International Paper Company case as to the construction of these statutes in their combined operation. But this assumption was essential to the result. If, in enacting the statute of 1914, the Legislature of Massachusetts had by a preamble expressly declared its intention that, if the proposed additional tax should be held to be illegal, taxes should be assessed upon all foreign corporations only under and by virtue of the statute of 1909 and subject to the limitations therein contained, the tax in Locomobile Company *v.* Massachusetts would have necessarily been sustained.

State Decisions Conclusive.

It is elementary that even in a single statute valid provisions may be separated from those which are unconstitutional and be enforced to their fullest extent, provided it can be said that the two parts are separable and independent in character.

International Textbook Co. *v.* Pigg, 217 U. S. 91, 113.

Allen *v.* Louisiana, 103 U. S. 80, 84.

Warren *v.* Mayor and Aldermen of Charlestown, 2 Gray, 84, 98.

This is of course merely a matter of determining the intention of the Legislature. If it can be said that it did not intend that the statute be enforced except as a whole, the invalidity of any portion nullifies the whole. If, on the other hand, it is found to have been the intention that the valid portions should in any event be enforced, that will be done. In each instance it is merely a matter of ascertaining the intention of the Legislature and of carrying that intention into effect.

This court recognizes that it is the duty of the state courts alone to determine the true interpretation of state statutes. It has not infrequently reversed a prior decision of its own in order to follow the latest ruling of a state court on a matter of interpretation. It has done this even when a state court has entirely reversed its position.

Green *v.* Neal's Lessee, 6 Pet. 291.
Fairfield *v.* County of Gallatin, 100 U. S. 47, 54.
Wade *v.* Travis County, 174 U. S. 499, 508.

Subsequent Decisions in Mass.

Since the decision in Locomobile Company *v.* Massachusetts the question of the proper construction of these two statutes in their combined operation has been fully considered by the Massachusetts Supreme Judicial Court. In Liquid Carbonic Co. *v.* Commonwealth, 232 Mass. 19, that Court again had before it the question of the validity of an excise of less than $2,000 assessed upon a foreign corporation under St. 1909, c. 490, Pt. III, § 56, while St. 1914, c. 724, was still in force. The essential part of the Court's opinion was as follows:

"The excise here in question stands on precisely the same footing with respect to St. 1909, c. 490, Part III, § 56, and St. 1914, c. 724, as did the excise tax assessed upon the Locomobile Company of America, which was before this court in Locomobile Co. of America *v.* Commonwealth, 228 Mass. 117. Said section 56 imposed an excise tax upon foreign corporations, for the privilege of doing a local as distinguished from an interstate business within this Commonwealth, of one-fiftieth of one per cent on the par value of its authorized capital stock, the amount of the excise in any one year not to exceed $2,000. Said chapter 724 imposed an excise of one one-hundredth of one per cent on the par value of the authorized capital stock of such corporation in excess of $10,000,000. We thought that, because the excise imposed by said section 56, as applied to foreign corporations in situation similar to the Locomobile Company of America, doing local business within the Commonwealth, had been held not to offend against any provision of the Constitution of the United States in Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, it followed that corporations with an aggregate capital stock of less than $10,000,000 and hence not directly affected by said chapter 724, could still legally be taxed under said section 56 regardless of said chapter 724. We said that it was not even necessary in that connection to discuss said chapter 724. But it has been held that we were in error upon that point. Our judgment was reversed in Locomobile Co. of America *v.* Massachusetts, 246 U. S. 146. It there was decided on writ of error to this court that the excise was illegal and that the petitioner was entitled to recover the entire amount paid. That decision was made although the amount of the excise was ascertained wholly pursuant to the terms of said section 56 unaffected by said chapter 724, and although, but for the enactment of said chapter 724, the excise would have been valid under Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68. We recognize the binding nature of that decision. Our only concern now is to apply it to this and other cases as

curately so far as we are able to understand it. It seems to us to cover the case at bar in every essential particular.

"It was argued by the Attorney-General that the question now presented is merely one of construction of statutes of this Commonwealth, as to which it is the settled practice of the Supreme Court of the United States to follow the interpretations of State courts, Old Colony Trust Co. *v.* Omaha, 230 U. S. 100, 116; Northern Pacific Railway *v.* Meese, 239 U. S. 614, 619; and further that the true construction of said section 56 and said chapter 724 is that they are separable, and that the first should be upheld even if the latter is unconstitutional.

"We did not discuss or consider that question at all in International Paper Co. *v.* Commonwealth, 228 Mass. 101. We did not regard it as involved in that decision because we thought (erroneously as it has since been held in International Paper Co. *v.* Massachusetts, 246 U. S. 135) that both statutes together did not violate the rights of the petitioner under the Constitution of the United States.

Sts. 1909 and 1914 held Severable.

"We thought and still think that the plain words and direct result of our decision in Locomobile Co. of America *v.* Commonwealth, 228 Mass. 117, was that the two statutes were independent, separable and severable and that section 56 was and remained valid even if chapter 724 should be held void, or, if its effect in combination with said section 56 should be to vitiate the system of taxation. Ashley *v.* Three Justices of the Superior Court, 228 Mass. 63, 81. That was our purpose. But it would be vain at this time to amplify further our views to that effect. We are unable to discern any reason why in Locomobile Co. of America *v.* Massachusetts, 246 U. S. 146, it would not have been held that said section 56, and said chapter 724 were separable and the excise valid under section 56, if that court had thought that principle of law to be pertinent. International Textbook Co. *v.* Pigg, 217 U. S. 113. The conclusion cannot be escaped, in our opinion, that in Locomobile Co. of America *v.* Massachusetts, 246 U. S. 146, the Supreme

Court of the United States decided that an excise, assessed and collected as was the one here assailed, was exacted illegally. It would be idle for us to discuss that question. The last word has been spoken by the court of final appeal upon that subject. That is a decision by which we are bound on this point. We yield to its controlling authority. That decision seems to us to govern exactly the case at bar."

Mass. Court misunderstood this Court.

It is to be regretted that the Court did not point out why it considered itself bound by Locomobile Company *v.* Massachusetts, notwithstanding its ruling that the statute of 1909 under which the tax in question was assessed is entirely severable from the statute of 1914. The illogical character of the conclusion of the foregoing opinion strongly indicates that the Massachusetts Court misunderstood the basis of the decision of this Court which it was following. It entirely overlooked the fact that, in International Paper Co. *v.* Massachusetts, at page 140, this Court said:

"While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, *its operation and validity must be determined here by considering it as a whole, for the opinion of the state court* not only holds that the 'maximum limitation' put on the tax by the part first enacted is 'removed' by the other, but *treats the two parts as exacting a single tax* based on the par value of 'the entire authorized capital' and computed as to ten million dollars thereof at the rate of one-fiftieth of one per cent and as to the excess at the rate of one one-hundredth of one per cent."

Statutes again held Severable by Mass. Court.

On March 18, 1918, St. 1914, c. 724, was repealed. In the case of Lawton Spinning Company *v.* Commonwealth, 232 Mass. 28, decided upon the same day as the case of the Liquid Carbonic Co., the court had before it the validity of a tax assessed under the statute

of 1909 after the statute of 1914 had been repealed. In determining this question the court considered even more fully the effect of the combined operation of these two statutes as a matter of construction. It declared:

"Whatever illegal element was introduced into our tax system by St. 1914, c. 724, it cannot be thought that the Legislature intended the whole system to fall rather than that the illegal element should be detected and cut out by being declared unconstitutional. It is manifest to us that the Legislature did not intend to inject illegality into said section 56 by the enactment of St. 1914, c. 724, but that its purpose was that the latter statute should stand or fall on its own merits. Since said chapter 724 did introduce an unconstitutional element into the tax law, as has been decided by International Paper Co. *v.* Mass., 246 U. S. 135, that chapter can, and in our opinion it ought, alone, to be declared unconstitutional, and that it ought to be held further that said chapter 724 did not infect with invalidity said section 56, and that said section 56 stands unaltered, unimpaired and uninfluenced by the unconstitutional, independent and separable St. 1914, c. 724. The result is, that although St. 1914, c. 724, is unconstitutional, it is entirely independent, separable, severable and distinct from said section 56, and that said section 56 stands and remains a constitutional provision, free from any taint arising from the unconstitutional efforts of the Legislature to enact the provisions of said chapter 724. That is what we intended to decide in Locomobile Company of America *v.* Com., 228 Mass. 117, 122. That is what we now expressly declare, so far as the matter is within our jurisdiction to decide. We did not intend to discuss this question at all in deciding International Paper Co. *v.* Com., 228 Mass. 101, because we did not then regard this point involved in the conclusion there reached. All that was said in that opinion was from another point of view and with a different object. We are unable now to perceive anything in that opinion inconsistent with or bearing upon the decision

here made. The two seem to us wholly in harmony. But if there is in that opinion any part or expression which may be thought at all at variance with the conclusion here reached upon this point, that part or expression is now overruled."

See also, Old Dominion Co. *v.* Commonwealth, 237 Mass. 269, 276.

This Court misunderstood Mass. Court.

It is, therefore, now plain that the assumption made by this Court in the passage from International Paper Company *v.* Massachusetts, above quoted, and followed in Locomobile Company *v.* Massachusetts, was based upon a misapprehension of the views of the Massachusetts court. Any expressions in its opinions which may be thought to warrant that assumption are now expressly overruled.

Conclusion.

It necessarily follows that only the statute of 1914 and taxes assessed upon corporations coming within its terms are invalid under the principles laid down in Looney *v.* Crane Company, *supra*, and International Paper Company *v.* Massachusetts, *supra*.

The statute of 1909 having been sustained by this Court in Baltic Mining Company *v.* Massachusetts, *supra*, and Cheney Brothers Company *et al. v.* Massachusetts, *supra*, and taxes assessed solely by its operation being thus in every respect valid, such taxes cannot be in any wise affected by the presence upon the statute books of an invalid statute, applicable only to other corporations, which is independent, separable, severable and distinct from the statute under which they are assessed.

It therefore must be said that all of the taxes involved in these cases, having been assessed solely under the statute of 1909, are in all respects valid.

III.

There is No Personal Liability upon the Defendant to repay Invalid Excise Taxes collected by Massachusetts while he was Treasurer and Receiver-General.

The liability which the plaintiffs seek to maintain in these actions is based entirely upon the principles of the common law, the claim being that, under the circumstances presented, the defendant is liable in a common law action for money had and received. The defendant claims, first: that any common law principles which might under any circumstances render him personally liable for invalid taxes collected by him have now been rendered inoperative by the Statutes of Massachusetts; and, second: that in no event upon the facts in these cases would he be liable at common law in an action for money had and received, or otherwise.

First. — If any Such Common Law Liability as is relied upon in these Cases ever existed in Massachusetts, it has been repealed or rendered inoperative by St. 1909, c. 490, Part III, Sects. 70 and 71.

Nature of Statutory Remedy.

By that statute (*supra*, p. 9), in effect in substantially its present form since 1867, a remedy is given directly against the Commonwealth for the recovery of all excise taxes illegally exacted from any corporation. This remedy consists in an application by petition to the Supreme Judicial Court within six months from the payment of the tax. It is expressly

provided in section 70: "Said petition shall be
exclusive remedy." The proceedings are to confo
as nearly as may be to proceedings in equity and
court is to determine whether the whole or any p
of the excise was assessed without authority of l
Upon an adjudication that a tax is wholly or parti
illegal the Treasurer and Receiver-General of
Commonwealth, upon a proper audit and certific
is authorized to pay to the petitioner the amount
the illegal exaction without any further legisla
action.

Adequate and Reasonable.

This remedy is of course plainly adequate, as
the resources of the State are thus made avail
for the repayment of the illegal tax. The corpora
is no longer made dependent upon the personal finan
responsibility of any public officer. The only
dition is that the application shall be made, that
that the suit shall be begun, within six months f
the payment of the tax.

It cannot be said that this requirement is unrea
able. Short statutes of limitation are peculiarly
propriate as a bar to tax litigation, for it is esse
that the taxing authorities shall know promptly
taxes, that have been collected, are to be contested
may have to be repaid. This statute accords witl
established policy in Massachusetts which has
frequently sustained by the courts of that State.

> Mulvey *v.* Boston, 197 Mass. 178, 183.
> Wheatland *v.* Boston, 202 Mass. 258.
> Lever Bros. *v.* Commonwealth, 232
> 23, 25.

It in no way violates the principles frequently laid down by this Court.

Turner *v.* New York, 168 U. S. 90.
American Land Co. *v.* Zeiss, 219 U. S. 47.
Blinn *v.* Nelson, 222 U. S. 1, 7.
U. S. *v.* Morena, 245 U. S. 392, 397.

Abolishes any Personal Liability of Officers.

The defendant contends that the provision of this statute, "said petition shall be the exclusive remedy," must be construed entirely to abolish any personal liability of any description to which the Treasurer and Receiver-General of the Commonwealth might have been subject at common law prior to its enactment. This provision can, of course, have no reference to any liability exclusive of the statute on the part of the Commonwealth, for as a sovereign state it could not be impleaded in its own courts or made subject to any suit or legal liability without its expressed consent.

Thus, the other remedies which are excluded by this provision must be remedies to establish the personal liability of public officers or this language can have no meaning. A far-reaching remedy is provided against the Commonwealth, giving relief in all cases, and for that reason the inadequate common law remedy against a public officer is abolished. An examination of the history of this provision demonstrates that this must have been its purpose.

History of St. makes this Construction obvious.

This method of contesting the validity of corporation taxes was established by St. 1867, c. 52. Section 1 of that statute provided a summary method of collecting such taxes substantially as now existing in St. 1909, c. 490, Part III, sect. 69. Sections 2 and 3

gave to the corporation a remedy by petition in substantially the same language now existing in the statute under consideration. Section 4 contains the following provision:

"The remedy herein provided by petition shall take the place of any and all actions which might otherwise be maintained by such corporation on account of the assessment and collection of such a tax and shall be the exclusive remedy."

This section remained in force without change until the revision and consolidation of the statutes in 1882 when it became, in substantially the form just quoted, P. S., c. 13, sect. 66. This again remained unchanged until the next consolidation of the statutes in 1902, when the provisions of law providing the remedy in question were consolidated into substantially their present form in R. L., c. 14, sects. 67 and 68. At that time the more verbose provision of St. 1867, c. 52, sect. 4, was reduced to the simple declaration "said petition shall be the exclusive remedy."

It is plain that in neither of the revisions of the statutes above referred to was there any intention of changing the meaning of this statute. Accordingly it must be held that the declaration "said petition shall be the exclusive remedy" must mean said petition "shall take the place of any and all actions which might otherwise be maintained by such corporation on account of the assessment and collection of such a tax."

Obviously, as there then appears to have been no action which a corporation could maintain on account of the assessment and collection of the tax against the Commonwealth, this must mean that the new remedy by petition was to take the place of any and all actions that a corporation might maintain against a public

officer on account of the assessment and collection of the tax.

Prior to about this time there had been little occasion for the employment of such rights of action, since the taxation of corporations was only beginning, but the reports of the Supreme Judicial Court furnished at least one well-known instance of such a remedy in the leading case of Portland Bank *v.* Apthorp, Treasurer and Receiver-General, 12 Mass. 252. This was an action of trespass brought by a corporation against the Treasurer and Receiver-General of the State after the collection of a tax by him, in which it was claimed that the tax was in violation of the constitution. No subsequent instance in the published reports of this character has been found. But in matters relating to municipal taxation, personal actions against public officers were not unfamiliar.

Stetson *v.* Kempton, 13 Mass. 272.
Ingles *v.* Bosworth, 4 Pick. 498.
Lincoln *v.* Worcester, 8 Cush. 55, 58.
Eames *v.* Johnson, 4 Allen, 382.

Shortly prior to the enactment of the statute in question the method adopted for litigating contested corporation taxes seems to have been to contest a suit for the collection of the tax brought either in the name of the Commonwealth or of the State Treasurer.

Commonwealth *v.* Hamilton Mfg. Co., 12 Allen, 298.
Commonwealth *v.* Provident Institution for Savings, 12 Allen, 312.
Commonwealth *v.* Peoples Five Cents Savings Bank, 5 Allen, 428.
Oliver *v.* Washington Mills, 11 Allen, 268.

Both these methods of contesting such taxes were obviously unsatisfactory. The remedy at common law against public officers imposes upon him an unfair and burdensome financial responsibility. The method of a suit to collect a tax might seriously interfere with the finances of the State, by postponing the receipt of its revenue. Accordingly, the statute of 1867, chapter 52, was passed to place the matter on a more equitable basis. The Commonwealth was given summary remedies for the collection of the tax and the corporation was given a right by a special form of procedure to recover directly from the Commonwealth all taxes illegally assessed.

It was a natural and an essential part of such a system that all remedies existing at common law against a public officer should be abolished. So far as can be found there has been no resort to any such personal action in Massachusetts since the enactment of this statute of 1867 until the present group of actions were brought in the United States District Court. Of course such a proceeding would never have been thought of in these cases, if these plaintiffs had not failed properly to take advantage of the statutory remedy. See International Paper Co. *v.* Commonwealth, 232 Mass. 1.

It is settled that since the enactment of the statute of 1867 questions as to the validity of a tax cannot be raised by a corporation in a proceeding to collect the tax, but must be raised by a petition under it.

> Attorney-General *v.* East Boston Co., 222 Mass. 450.

Therefore no Common Law Liability in Mass.

It is thus clear that there is no common law liability in Massachusetts on the part of this defendant for the repayment of any taxes paid to him, while he was in

office as Treasurer and Receiver-General, even though those taxes were entirely invalid. The statute in question accomplishes in Massachusetts by express enactment the same result which this court found to be implied from the United States statute under consideration in Cary *v.* Curtis, 3 How. 236.

This Court has several times recognized that any such common law liability can thus be destroyed, provided a reasonable substitute is provided therefor.

Lambourn *v.* County Commissioners, 97 U. S. 181, 185.

Arkansas Building Association *v.* Madden, 175 U. S. 269, 274.

No Federal Common Law.

It is equally clear that there is no common law of the United States independent of the common law of a particular state. The Federal Courts sitting within a state enforce only the common law of that state. If any particular portion of the common law has been repealed, all rights of action under it are abolished in the Federal Courts as well as in the State Courts.

United States *v.* Hudson, 7 Cranch, 32.

United States *v.* Coolidge, 1 Wheat. 415.

Wheaton *v.* Peters, 8 Pet. 591, 657.

Smith *v.* Alabama, 124 U. S. 465.

Bucher *v.* Cheshire R.R. Co., 125 U. S. 555, 583.

Western Union *v.* Call Publishing Co., 181 U. S. 92, 101.

In Smith *v.* Alabama, *supra*, this court said, at page 475:

"The statute of Indiana held to be valid in that case was in addition to and an amendment of the general body of the

law previously existing and in force regulating the relative rights and duties of persons within the jurisdiction of the state, and operating upon them, even when engaged in the business of interstate commerce. This general statute of law, subject to be modified by state legislation, whether consisting in that customary law which prevails as the common law of the land in each state, or as a code of positive provisions expressly enacted, is nevertheless the law of the state in which it is administered, and derives all its force and effect from the actual or preserved exercise of its legislative power. It does not emanate from the authority of the national government, nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States, nor can it be implied as existing by force of any other legislative authority than that of the several states in which it is enforced. It has never been doubted but that this entire body and system of law regulating in general the relative rights and duties of persons within the territorial jurisdiction of the state, without regard to their pursuits, is subject to changes at the will of the legislature of each state, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law the observance of which the State undertakes to enforce as its public policy. And it is in contemplation of the continued existence of this separate statute of law in each state that the Constitution of the United States was framed and ordained with such legislative powers as therein granted expressly or by reasonable implication."

At page 478 the Court says:

"There is no common law of the United States in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied

ocal law, and subject to such alteration as may be pro-
y its own statute. Wheaton *v.* Peters, 8 Pet. 591. A
nation in a given case of what that law is may be dif-
n a court of the United States from that which prevails
judicial tribunals of a particular state. This arises from
umstances that the courts of the United States in cases
their jurisdiction, where they are called upon to ad-
r the law of the state in which they sit or by which the
tion is governed exercise an independent though con-
jurisdiction, and are required to ascertain and declare
according to their own judgment. This is illustrated
case of Railroad Company *v.* Lockwood, 17 Wall. 357,
he common law prevailing in the state of New York, in
e to the liability of common carriers for negligence, re-
a different interpretation from that placed upon it by
icial tribunals of the state; but the law as applied was
e less the law of that state."

re is of course no question but that a state may constitutional limitations change or abolish mmon law. **Repeal of Common Law Liability valid.**

Chicago, Milwaukee & St. Paul R.R. *v.* Solan, 169 U. S. 133, 136.

v of the ample remedy in Massachusetts against mmonwealth itself, a remedy far more adequate hen limited by the financial responsibility of blic officer, it cannot be suggested that the s in the common law brought about by this in any way exceed any limitation imposed Federal Constitution.

is there any merit in the suggestion that these al sections are in any way affected by the ns of this court in International Paper Com-. Massachusetts, *supra*, and Locomobile Com-

pany *v.* Massachusetts, *supra*. They form no part of the tax laws there under consideration. They have been upon the statute books of the State for many years before the enactment of those acts and they apply to all forms of taxation imposed by the State upon any corporation, domestic or foreign. They are entirely separable in their history and effect from every statute determining the method of taxing foreign corporations. Only by reason of the fact that in 1909 all the tax laws of Massachusetts were codified into one chapter (St. 1909, c. 490) do they have the slightest association.

It is therefore submitted that the fifth request for rulings should have been granted in each of these cases.

Second. — In No Event would the Defendant be Personally Liable at Common Law to these Plaintiffs on Account of the Taxes involved in the Cases at Bar.

The nature of the claims made in these cases should be clearly noted. It is sought to hold the defendant personally liable to repay out of his own funds taxes paid by these plaintiffs into the treasury of the Commonwealth while he was in office as Treasurer and Receiver-General, the sole ground of liability being that after long years of litigation this Court eventually held those taxes to have been in violation of the Federal Constitution.

Limitations on Defendant's Powers.

The defendant was directed by the statutes of the Commonwealth to receive these payments in its behalf (St. 1909, c. 490, Pt. III, sects. 55, 56, *supra* p. 7) and, as in the case of all other revenue, to pay them into its treasury. St. 1917, c. 277, sect. 1

now G. L., c. 29, sect. 1. After this had been done he had no authority to repay this money to these plaintiffs or in any manner to take it into his personal possession.

The Constitution of the Commonwealth, c. II, sect. 1, art. XI, expressly forbids any payment out of the treasury "but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court." R. L., c. 6, sect. 28, now G. L., c. 29, sect. 18, forbids any payment from the treasury except where special provision is made, "without a warrant from the governor drawn in accordance with an appropriation in some act or resolve of the same or of the preceding year after the demand or account to be paid has been certified by the auditor."

The only provision of law authorizing the repayment out of the treasury without an act of the Legislature of any corporation tax once paid into it is found in St. 1909, c. 490, Pt. III, sect. 71, *supra*, p. 10, which authorizes the Treasurer, acting, of course, upon a warrant of the Governor, to satisfy a decree for the abatement of such taxes entered by the Supreme Judicial Court in proceedings instituted under section 70 of that statute. Even if a check drawn by the Treasurer in violation of these provisions of the Constitution and the statutes should be honored by the bank, a payment thus made by him would clearly be a violation of law, a breach of the condition of the Treasurer's bond established by R. L., c. 6, sect. 1, now

G. L., c. 10, sect. 2, and a misappropriation by him of the funds of the Commonwealth.

The extraordinary remedy which was adopted in these cases is pursued merely because these plaintiffs failed to protect their rights by taking advantage of the direct remedy given them against the State by St. 1909, c. 490, Pt. III, sects. 70 and 71 already discussed. Record, No. 98, p. 7; Record, No. 99, p. 8, *supra*, p. 5. In the event that the plaintiffs in these cases should prevail, by reason of the large number of similar cases now pending, the only course open to this defendant would be, either to apply to the Bankruptcy Court for relief, or to appeal to the Legislature of Massachusetts to relieve him from the financial burden to which he would thus become subject. Obviously a claim of this character should be scrutinized with unusual strictness before it is permitted to prevail.

Voluntary Payments not recoverable.

It is elementary that voluntary payments made with full knowledge of the facts and without fraud or duress cannot be recovered, even though there was no obligation to make the payment, this being true as well in cases of voluntary payments to public officers.

United States *v.* Wilson, 168 U. S. 273.
Forbes *v.* Appleton, 5 Cush. 115.

There is no question but that such a payment made under an invalid or unconstitutional statute is a voluntary payment made under a mistake of law and cannot be recovered.

Benson *v.* Monroe, 7 Cush. 125.

"The case is not altered by the fact that the party, so paying, protests that he is not answerable, and gives notice that h

ring an action to recover the money back. He has an unity, in the first instance, to contest the claim at law; , or may have, a day in court; he may plead and make hat the claim on him is such as he is not bound to pay."

Benson *v.* Munroe, *supra*, at page 131.

settled that a protest does not make a payment wise voluntary an involuntary one.

Railroad Co. *v.* Commissioner, 98 U. S. 541, 544.

Cook *v.* Boston, 9 Allen, 393.

Rosenfeld *v.* Boston Mutual Life Ins. Co., 222 Mass. 284, 289.

Purpose of Protest.

e sole purpose of a protest in the ordinary case is icate that the legality of the demand is not recog- It serves to show that the payment was made because of threatened duress. In Railroad Co. *v.* nissioners, 98 U. S. 541, 544, it is said:

ere are, no doubt, cases to be found in which the lan- of the court, if separated from the facts of the particular nder consideration, would seem to imply that a protest was sufficient to show that the payment was not volun- but on examination it will be found that the protest was o give effect to the other attending circumstances. Thus, ott *v.* Swartwout (10 Pet. 137) and Bend *v.* Hoyt (13 *Id.*, which were customs cases, the payments were made to re- oods held for duties on imports; and the protest became ary, in order to show that the legality of the demand was dmitted when the payment was made. The recovery upon the fact that the payment was made to release ty from detention, and the protest saved the rights which out of that fact. In Philadelphia *v.* Collector (5 Wall. nd Collector *v.* Hubbard (12 *Id.*, 13), which were internal-

revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal-revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the tax-payer such remedy'. It is so expressly stated in the last case, p. 14. As the case of Erskine v. Van Arsdale (15 *Id.*, 75) followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in custom cases, and gives notice that the payment is not to be considered as admitting the right to make the demand."

These general principles, relating to all cases of attempted recovery of money payments, were early applied in Massachusetts in suits to recover taxes paid to cities and towns. It was established that there may be recovery in such cases only when the illegal payment is made under actual or threatened duress.

Prescott *v.* Boston, 12 Pick. 7.
Boston & Sandwich Glass Co. *v.* Boston, 4 Met. 181.
Lincoln *v.* Worcester, 8 Cush. 55, 59.

Recovery in cases of this sort is now regulated in Massachusetts by statute, being allowed in certain cases where payments are merely made under protest. St. 1909, c. 490, Pt. II, sect. 88. Accordingly the later Massachusetts cases must be distinguished and are of little value in this discussion.

Duress, Actual and Implied.

Two classes of duress are involved in cases of this character, actual and implied. Where force is actually set in motion against a tax payer's person or property and he makes the demanded payment solely to stop the machinery already set in motion, no question arises but that the payment is made under duress and

e recovered, if illegal. It is clear, however, that
lic officer demanding the tax need not go so far
er to make a payment involuntary so far as the
district is concerned. If the statutes of the
provide methods by which the payment of the
ay be enforced through distraint of goods or other-
ithout legal proceedings for testing the validity
tax, or if the tax payer may refuse to pay only
risk of incurring serious or unusual penalties
may be entirely disproportionate to the amount
involved, it is held in many cases that the mere
nce of these remedies constitutes such a threat
ress that a payment made under their influence
e found to be a payment under implied duress,
though there is no actual threat to employ the
y.

Atchison, etc., R.R. *v.* O'Connor, 233 U. S. 280, 281.
Garr Scott & Co. *v.* Shannon, 223 U. S. 468.
Boston & Sandwich Glass Co. *v.* Boston, 4 Met. 181.

se distinctions are of little importance in dealing
statutes to recover from municipalities or other
districts taxes illegally collected and paid into
treasuries. In cases of this character the district
en unjustly enriched at the expense of the tax
and it is of little consequence whether the tax
has yielded to some compelling legal process
has already been set in motion, or whether he
erely paid with the knowledge that such a process
ithin the easy reach of some public officer and
eventually be employed by him. In either event

the municipality or taxing district has obtained his money by threatened duress of his person or property.

Public Officer must participate in Tort to be Liable.

It is quite a different matter when recovery is sought against a public officer in his personal capacity in cases where he no longer has the funds collected in his hands. He has not been enriched at the tax payer's expense. He cannot be made to respond in damages out of his own funds unless he has been guilty of some wrongful act; that is, unless he can be shown to have participated in the actual or threatened compulsion to which the tax payer yielded in making his payment. He must be shown in some manner to have been a tortfeasor, otherwise he cannot be held liable in damages because of the tort.

If an officer has actually seized property in satisfaction of a tax or done some other positive act which would constitute a tort if not justified by his official authority, then if suit is brought against him, his only defense is the statute or other authority under which he is acting. If it appears that the statute or other authority under which he is purporting to act is unconstitutional, or otherwise invalid, then his authority disappears and with it his defense.

This ground for liability is fully discussed in Virginia Coupon Cases, 114 U. S. 269, at 288, where the Court says:

"The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can con-

mand only by laws. It is necessary, therefore, for such a defendant in order to complete his defe[illegible] to produce a law of the state which constitutes his commu[illegible]ion as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, national bank currency and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense."

Defendant Guilty of no Actual Duress.

It is clear, however, that the defendant took no part in any act of actual duress against these plaintiffs.

In the first place there is nothing to show that he took any part even in the mere receipt of any of the payments made by these plaintiffs. Whether the checks came in by mail or over the counter they were handled by a receiving teller, who endorsed them by the use of a rubber stamp in the name of the defendant as Treasurer and Receiver-General and then deposited them in one of the bank accounts of the Commonwealth. It does not appear that the defendant ever even saw or handled any one of the checks or that he had any knowledge that any of these payments were

being made. Every act relating to them appears to have been done by a subordinate employee of the Commonwealth appointed under statutory authority. R. L., c. 6, sect. 4, now G. L., c. 10, sect. 5. Such an employee was of course in no sense the personal agent of the defendant.

Defendant had no Power to enforce Payment.

Furthermore, no duty was imposed upon the defendant either to demand the payment of any of these taxes or to seek to enforce payment by any corporations which were delinquent. The statutes of the Commonwealth impose no duty upon him concerning the collection of these taxes except the duty of receiving the money which the Tax Commissioner has certified to be due, when it is tendered to him by the corporation.

The tax is an unusual one in that it does not become due at any particular time, and in that there is no direct obligation upon the company to pay it. The obligation imposed upon a foreign corporation by St. 1909, c. 490, Pt. III, sect. 54, *supra*, p. 6, is to file a certificate of its condition within a specified period after the date fixed for its annual meeting. As a condition precedent to its right to file this certificate, it must obtain the approval of the certificate by the Commissioner of Corporations, who is also Tax Commissioner, and pay the tax certified by him to be due to the Treasurer. (Section 55, *supra*, p. 7.) The tax thus becomes due only when the corporation tenders it as a condition precedent to the filing of the required certificate. There is no penalty for a failure to pay the tax, and there is not even a provision for interest upon it, for it has no due date. The penalties and the methods

of enforcement all relate, not to the payment of the tax, but to the filing of the certificate of condition.

Old Dominion Co. *v.* Commonwealth, 237 Mass. 269.

As provided by section 58 (*supra*, p. 7), if a corporation omits to file such a certificate within the time prescribed, the Tax Commissioner gives notice to it by registered mail, calling its attention to the penalties provided by this section. If the certificate is not then filed within thirty days, the corporation becomes subject to a penalty of not less than $5 nor more than $10 for each day for the first fifteen days, and of not less than $10 and not more than $200 a day thereafter, or for such other sum as the court may determine. Such penalties are to be recovered either in actions of contract brought in the name of the Commonwealth or by an information in equity brought by the Attorney-General at the relation of the tax commissioner. Upon the latter proceedings, the one in fact uniformly used, an injunction against continuing in business may be issued until the certificate is filed. From the nature of and the method provided for collecting this tax, it is plain that St. 1909, c. 490, Pt. III, sects. 62 and 69, have no application to it.

It will be noted that the Treasurer and Receiver-General has nothing whatever to do with any of these proceedings for compelling the filing of a certificate of condition. The fact that a corporation is delinquent is not even a matter of record in his office. It is the duty only of the Tax Commissioner to notify the

corporation of its delinquency and then to report the matter to the Attorney-General for action by him, if the corporation does not comply with the law. If, as contended by the plaintiff, the mere presence of these provisions upon the statute books constitutes implied duress, it must be such duress on the part of the Commonwealth itself or possibly on the part of the Tax Commissioner, whose duty it is to enforce the statute. These sections cannot in any way constitute duress on the part of the Treasurer who has no duty whatever to perform except to receive the amount of the tax, when it is tendered to him by the corporation without demand on his part.

No Duress can be implied as against Defendant.

But the plaintiffs say that implied duress is to be found in the mere existence of these statutory penalties and that therefore any payment to the defendant or to his department is an involuntary payment and may be recovered. If we assume this to be true so far as the Commonwealth is concerned, so that if it were a mere taxing district and not a sovereign state, it could be held liable, can the defendant, who had no duty to perform in connection with these penalties, be held liable merely because he received money from a corporation, knowing that these penalties are provided by law, but not knowing either that their existence is having the slightest effect upon the act of the corporation in making the payment or even that the corporation is disputing the legality of the payment? In other words can it be held that the defendant is liable when he had no opportunity to protect himself from liability?

The statutes direct him to collect the tax. If it is tendered to him or at his office without protest of

any sort, he and his subordinates have the right to assume that such tender is a voluntary payment of an admitted liability. Elementary principles require that he must have notice of the claim of illegality, and of the yielding to implied threats of force, if those threats are to be made his and are to subject him to liability; that he must be liable, if at all, upon the ground that he had an opportunity either to refuse to receive the illegal exaction or to retain it in his personal possession until the question of its legality could be determined. He could do neither if he had no notice of the claim or of the yielding to duress. He could not be made a wrongdoer without ever having had an opportunity to perform what is now claimed to have been his legal duty to these plaintiffs.

Defendant not Liable without Notice of Claim of Illegality and of Intention to hold personally Liable.

Accordingly it has been for many years the established doctrine in this Court that taxes illegally assessed and paid to a public officer, even though paid to release goods unlawfully held, may not be recovered from such officer, unless at the time of the payment he is notified by the tax payer that the taxes which are being demanded are regarded as illegal and that he will be held personally liable to make reimbursement.

The leading case is Elliott *v.* Swartwout, 10 Pet. 137, which involved the right of a plaintiff who, in order to release his goods, had made a payment claimed to be due as an import duty to recover the same from the Collector. Three questions were certified to this Court. In answer to the first question the court held the tax to have been illegally exacted. In stating and discussing the second question the Court said:

"The case put in the second point, is where the collector has received the money in the ordinary and regular course of

his duty, and has paid it over into the treasury, and no objection made at the time of payment, or at any time before the money was paid over to the United States. The manner in which the question is here put, presents the case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money. It is therefore to be considered as a voluntary payment, by mutual mistake of law; and, in such case, no action will lie to recover back the money. The construction of the law is open to both parties, and each presumed to know it. Any instructions from the treasury department could not change the law, or affect the rights of the plaintiff. He was not bound to take, and adopt that construction. He was at liberty to judge for himself, and act accordingly. These instructions from the treasury seem to be thrown into the question for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he had paid over the money, without any intimation having been given that the duty was not legally charged, cannot be sustained upon any sound principles of policy or of law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard, by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation of any intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit. It is no sufficient answer to this that the party cannot sue the United States. The case put in the question, is one where no suit will lie at all. It is the case of a voluntary payment under a mistake of law, and the money paid over into the treasury; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right".

The Court stated the third question to be as follows:

"The case put by the third point, is where, at the time of payment, notice is given to the collector that the duties are charged too high; and that the party paying, so paid to get possession of his goods; and accompanied by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury".

The Court held that under such circumstances the collector was personally liable.

This case led to certain legislation from time to time with reference to the payment of import duties under protest, by which special rights and liabilities were created (Barney *v.* Richard, 157 U. S. 352, 355), but the principles laid down in this case have been ever since followed by this Court.

Carey *v.* Curtis, 3 How, 236, 249, 252.
Erskine *v.* VanArsdale, 15 Wall. 75.
Arkansas Building Assc. *v.* Madden, 175 U. S. 269, 273.
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Atchison, etc., Ry. Co. *v.* O'Connor, 223 U. S. 280, 287.
Garr Scott & Co. *v.* Shannon, 223 U. S. 468.
Smietanka *v.* Indiana Steel Co., 42 Sup. Ct. Rep., 1.

In Erskine *v.* VanArsdale, at p. 77, the Court thus stated the rule:

"Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them."

A leading and well reasoned case in the state courts is Van Buren *v.* Downing, 41 Wis. 122. A state statute imposing certain license fees had been previously sustained as constitutional by the State court. Later a decision of this Court was called to the court's attention which required it to overrule the previous decision and declare the statute unconstitutional. The plaintiff sought to recover license fees paid by him under this statute. It was held, following Elliott *v.* Swartwout and the other decisions of this Court, that as the payment was made without notice to the defendant of any claim of his personal liability, there could be no recovery. The same point was made as is now being made in the case at bar, namely, that the payments in question were made under duress and therefore were not voluntary payments. At page 131 the court in reply to this contention states:

"But we think that question is not material here, for we have found no case which holds that mere duress of goods without protest or denial of liability or notice of intention to bring suit to recover back the money exacted, is sufficient ground to sustain an action against an agent to recover back such money after the agent has paid it over to his principal in good faith."

As a necessary converse of this principle, it is held that when there is no coercion, a payment made to an

agent or a public officer cannot be recovered from him, even if made under protest and with notice that he will be held personally liable.

Smith *v.* Schroeder, 15 Minn. 35, 40.
Brumagim *v.* Tillinghast, 18 Cal. 265, 270.
Meek *v.* McClure, 49 Cal. 623, 628.

Without Protest and Notice of Liability no Tort by Officer.

These cases plainly indicate that the coercion is the wrongful act upon which liability in these cases is based and that the office of the protest and notice of personal liability is to make that coercion the act of the agent or officer in cases where he did not personally take part in it. Such protest and notice are thus essential elements of liability.

The foregoing decisions are merely an application, in cases involving payments to public officers, of principles, which upon the same reasoning, are broadly applicable in all cases where it is sought to recover from an agent money paid to him on account of his principal and turned over by him to his principal.

Elliott *v.* Swartwout, *supra*, at 155, 156.
Owen *v.* Cronk, 1895, 1 Q. B. 265.
Herrick *v.* Gallagher, 60 Barb. 578.
Shepard *v.* Sherin, 43 Minn. 382.

Thus far these cases have been discussed upon principle on the ground that, in order to make the defendant liable it must be established that he was to some extent personally a tortfeasor. It is not entirely clear whether the cases cited are always decided upon that ground or upon the ground that, in order to establish liability, it must be shown that the defendant received the payments in question under such circumstances as

to charge him with a trust or similar fiduciary obligation to hold the money for the benefit of the tax payer and not to pay it into the public treasury. Whichever principle be regarded as the basis of these decisions the result is the same.

No Trust can be implied against Defendant.

Examining the matter from the point of view that these suits are brought to enforce a trust obligation, it is plain that the plaintiffs must at least establish two essential elements.

In the first place, it must appear that the defendant has received and personally obtained control over the funds for which it is sought to make him liable. Plainly, no trust could attach to a sum of money so as to make an officer personally liable to repay it out of his own funds, unless at some time it came legally within his personal control. Only in such a case would it be possible to impose upon him the obligation of retaining it and repaying it to the plaintiff.

In the cases at bar the defendant personally received nothing from these corporations. The checks were handed to a subordinate officer or employee in the Treasury Department and were by him endorsed by use of a rubber stamp in the ordinary routine of business and deposited in a bank account of the Commonwealth. The defendant had no opportunity whatever to intervene to prevent such a deposit, as he appears to have had no personal notice that the payments were being made or that it was claimed that they were not legal obligations. If these plaintiffs intended to hold the defendant personally liable, they should have seen that he personally received and obtained control of these checks.

In the second place it is an essential element of such a trust obligation, even if the funds came within the direct control of the defendant, that at or prior to the time of the payment to him he should be given notice that the exaction is regarded as illegal, and that he will be held personally liable for the same. As indicated by the cases already cited, such a notice imposes upon him a direct obligation to the tax payer which could not otherwise exist. It then becomes his duty to retain the money in his personal possession as a stakeholder between his principal and the party who has made the payment. When such a notice of a claim of personal liability has been given, all three parties to the transaction can be fully protected. The tax collector at least can be protected in no other way.

It is submitted that, from whatever point of view these cases be considered upon principle, it must be held that there can be no liability, unless it be shown that the defendant was duly notified of the plaintiffs' claim that the taxes were illegal and that it was their intention to hold him personaliy liable for the amount of these payments.

Conclusion in No. 98.

In No. 98, Burrill *v.* Locomobile Co., no notice of any description was given to the defendant or to any other public officer. The payments were made in the ordinary course of business without any suggestion as to their invalidity. Accordingly under no circumstances is the defendant liable in that case. His request for rulings covered by assignments of error numbered six to nine inclusive should accordingly have been given.

In No. 99, Burrill *v.* Russell Miller Milling Co., each of the payments were forwarded to the State House,

together with the annual certificates of condition, in letters signed by the attorney for the company which contained the following paragraph:

Letter of Protest in No. 99 Insufficient.

"The said company makes payment of said excise and files said certificate of condition under protest and duress claiming that the said tax and the statutes compelling the filing of said certificate and the payment of said tax are unconstitutional and void and have no lawful obligation to said company."

These statements were not made or addressed to the defendant and never in any case came to his personal knowledge. Each of these letters was addressed to the Secretary of the Commonwealth and were forwarded to his office by mail. (Record, No. 99, p. 6.) The only duty imposed upon the Secretary was to receive and file the certificate of condition, when it had been approved by the Commissioner of Corporations and when the tax and filing fee had been paid. (St. 1909, c. 490, Pt. III, sects. 54 and 55, *supra*, pp. 6, 7). He accordingly sent the certificate of condition to the Tax Commissioner, who was also Commissioner of Corporations, and the letter together with the check to the office of the Treasurer. (Record, No. 99, pp. 6, 7.)

After the approval of the certificate by the Tax Commissioner the checks in each case were endorsed by the use of a rubber stamp by the receiving teller or some other employee in the office of the Treasurer, and were then deposited in a bank account of the Commonwealth together with other general revenue. (Record, No. 99, p. 6.) The letters remained on file in the office of the Treasurer and note was made upon the list of corporation tax payments that these payments were made under protest. There was no evidence

er, that any of these letters or checks "ever through the hands of the defendant personally ny way came to his attention before the bringing suit". (Record, No. 99, p. 7.)

plain, therefore, that neither of these payments came within the control of the defendant that l the opportunity to prevent them from being nto the treasury of the Commonwealth, and also o notice of any description ever came to his al knowledge that the plaintiff either claimed taxes to be invalid or proposed to hold him ally liable for their repayment.

Conclusion in No. 99.

hermore, even if the defendant can upon any be charged with knowledge of the contents e letters, it is plain that they in no way gave to him of any intention on the part of this ation to hold him personally liable to repay taxes. The letters merely state that the cor- n claims the taxes to be unconstitutional and ut says nothing further. They were obviously merely for the purpose of making it impossible Commonwealth to make the claim, made in ni Wireless Telegraph Co. *v.* Commonwealth, ass. 558, 561, that by filing its certificate of on without protest this corporation had ledged itself to be subject to this tax law.

obvious that even the plaintiff had no intention, time these letters were written, of seeking to he defendant personally liable for these taxes. y purpose was fully to protect itself in bringing dings directly against the Commonwealth for overy of these taxes under St. 1909, c. 490, Pt. t. 70, which has been heretofore fully discussed.

Such proceedings were actually begun by this plaintiff in the case of each of the payments now in question, and these petitions were pending in the Supreme Judicial Court until January 31, 1919, when they were dismissed upon the ground that they were not seasonably brought within the meaning of the statute as interpreted in International Paper Co. *v.* Commonwealth, 232 Mass. 7, decided January 6, 1919. It seems plain that the possibility of holding the defendant personally liable for these payments never occurred to any one until the failure of the proceedings brought directly against the State. Thus, even if the defendant be charged with knowledge of the paragraph of protest quoted from this plaintiff's letters, he can merely be said to have been warned that the plaintiff claimed the taxes to be illegal and proposed to bring proceedings against the State under the statute referred to as numerous other corporations had done. He cannot be charged with notice of any claim of personal liability on his part.

It accordingly follows that the defendant is not liable in this action to the Russell Miller Milling Company and that accordingly his requests for rulings covered by assignments of error numbered 6 to 9 inclusive should have been given.

IV.

Conclusion.

In accordance with the foregoing argument it is submitted that the judgments in each of these cases should be reversed and judgments entered for the defendant, plaintiff in error, on the ground, first, that

taxes sought to be recovered are in all respects id, and second, that in no event is the defendant der any personal liability to repay these plaintiffs taxes paid by them while he was in office as Treas- r and Receiver-General.

Respectfully submitted,

WM. HAROLD HITCHCOCK,

Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1921

No. 98

CHARLES L. BURRILL, *Plaintiff in Error*

v.

LOCOMOBILE COMPANY

No. 99

CHARLES L. BURRILL, *Plaintiff in Error*

v.

RUSSELL-MILLER MILLING COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR DEFENDANTS IN ERROR

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BOSTON
PRESS OF GEO. H. ELLIS CO.
(INCORPORATED)
1922

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Supreme Court of the United States

OCTOBER TERM, 1921

No. 98

CHARLES L. BURRILL, *Plaintiff in Error*

v.

LOCOMOBILE COMPANY

No. 99

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v.

RUSSELL-MILLER MILLING COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF FACTS

HISTORY OF THESE CASES.

These are actions for money had and received, brought by the Locomobile Company and Russell-Miller Milling Company against the plaintiff in error, who was treasurer of the Commonwealth of Massachusetts when the taxes were paid to recover taxes paid to him under the provisions of statutes held by this Court, in *Locomobile Company* v. *Commonwealth of Massachusetts,* 246 U. S. 146, unconstitutional. The plaintiff in error was treasurer when these suits were brought.

The taxes in suit paid by the Locomobile Company to the plaintiff in error, with the dates of payment, are as follows:

April 24, 1916	$1,300
April 25, 1917	1,300

and the taxes in suit paid by the Russell-Miller Milling Company are as follows:

November 24, 1915	$800
December 4, 1916	800
December 13, 1917	800

The checks in payment of these taxes were drawn to the order of the Treasurer of the Commonwealth of Massachusetts. These checks were deposited by the plaintiff in error in a bank account standing in the name of "Commonwealth of Massachusetts, Charles L. Burrill, Treasurer," and could be drawn out by him without other authority (Rec. No. 98, p. 6), and at all times the said bank account was and is more than sufficient to cover the amount of these taxes (Rec. No. 98, p. 7; Rec. No. 99, p. 7).

At the time these suits were brought, this Court, in *Locomobile Company* v. *Commonwealth of Massachusetts*, 246 U. S. 146, had determined that these taxes were illegal.

The taxes paid by the Russell-Miller Milling Company were accompanied by a written protest (Rec. No. 99, p. 8).

At the various times when these taxes were paid to the plaintiff in error by the defendants in error he was informed that the defendants in error and various other foreign corporations were litigating the constitutionality of the statutes under which the taxes were assessed (Rec. No. 98, p. 6; Rec. No. 99, p. 7).

At the time of payment of these taxes a petition by the *Locomobile Company* v. *Commonwealth* for the recovery of taxes of the same character and amount paid in 1915

had been filed in the Supreme Judicial Court for the County of Suffolk and had been argued before the full bench of that Court but had not been decided. A complete copy of the plaintiff's petition containing its claims and specific objections to the statute was duly served by a deputy sheriff upon the plaintiff in error, and he knew that from time to time certain foreign corporations were paying under protest excise taxes assessed upon them under these same statutes on the ground of unconstitutionality (Rec. No. 99, p. 7; Rec. No. 98, p. 6).

Within six months after each one of these payments, the defendants in error filed in the Supreme Court for the Commonwealth of Massachusetts, within and for the County of Suffolk, petitions for the recovery of the taxes involved in these actions, stating the claims of unconstitutionality and the specific grounds therefor in the same way as the defendants in error here claim (Rec. No. 99, p. 7; Rec. No. 98, p. 6).

During all this time the defendant remained treasurer and held these illegal taxes subject to his own check and absolute control.

Under Chap. 724, Acts of 1914, foreign corporations were taxed by the Commonwealth of Massachusetts solely on a percentage of their authorized capital stock (Appendix, p. 38).

In *International Paper Co.* v. *Commonwealth of Massachusetts*, 246 U. S. 135, at 145, this Court said:

> ". . . it is apparent that since 1914 the Massachusetts tax has been in its essential and practical operation like those held invalid in 1910 in *Western U Teleg Co.* v. *Kansas; Pullman Company* v. *Kansas;* and *Ludwig* v. *Western U Teleg Co.;* and like that held invalid at the present term in *Looney* v. *Crane Company.*"

The tax paid by the Locomobile Company in 1915 has

been recovered. This tax was involved in the decision by this Court of *Locomobile Company* v. *Commonwealth of Massachusetts*, 246 U. S. 146, levied and collected under the same system of taxation as were the taxes of which recovery is sought in these cases.

The Locomobile Company also brought suit against the Commonwealth of Massachusetts to recover the tax paid by it on April 25, 1917. This petition, however, was dismissed on motion of the Commonwealth. The petition was filed October 22, 1917, within six months after payment, and service of the order of notice issued thereon was accepted by the attorney for the Commonwealth on April 4, 1918, and a general appearance was filed on May 8, 1918, in behalf of the Commonwealth. This petition then was filed within the time required by the statute and as the attorney general knew awaited the final decision of the suit to recover the tax of the earlier year which had been argued before this Court. Relying on the mutual desire not to cause unnecessary expenditure in service of process, order of notice was taken out but not served until after the decision of that case on March 4, 1918, when service was accepted by the attorney for the Commonwealth and a general appearance filed in behalf of the Commonwealth. The petitioner in that case relied on the admitted equity practice in the Commonwealth of Massachusetts as expressed in the case of *Bancroft* v. *Sawin*, 143 Mass. 144, to the effect that only in case of gross or improper delay between the time of filing the bill and service of the subpœna will a court of equity in the exercise of the judicial discretion belonging to it refuse its assistance to the plaintiff and direct the bill to be taken off the file. The petition, however, was dismissed by the Massachusetts Supreme Court on the ground that it was not brought within six months of the payment of the tax as required by Sts. 1909, Chap. 490, Part III, Sec. 70.

Locomobile Co. v. *Commonwealth of Massachusetts,* 232 Mass. 16.
International Paper Co. v. *Commonwealth of Massachusetts,* 232 Mass. 7.

The Massachusetts Supreme Court admitted, in *International Paper Co.* v. *Massachusetts,* supra, at p. 11, that in making that ruling it was deciding contrary to the weight of authority to the effect that the Statute of Limitations "is interrupted by the filing of the bill."

See

Simm & Lane Timber Co. v. *United States,* 236 U. S. 574, at 578.

The Russell-Miller Milling Company also filed in the Supreme Judicial Court of the Commonwealth of Massachusetts petitions for the recovery of taxes involved in this action, which petitions were pending in that Court until January 31, 1919, when they were dismissed without prejudice (Rec. No. 99, p. 8).

Upon the dismissal of these actions against the Commonwealth of Massachusetts, the defendants in error brought suits in the Federal District Court of Massachusetts against the plaintiff in error as an individual and recovered judgment for the full amount of taxes paid by them, together with interest and costs.

These cases are now before this Court on writs of error granted to the defendants in these actions.

CONSTRUCTION OF THE STATUTES BY DECIDED CASES.

The unconstitutionality of the statutes under which these taxes were levied and paid is settled by the adjudged cases.

Because of the presence of a maximum limitation of

$2,000 the Acts of 1909, Chap. 490, Part III, Sec. 56, was originally held to be constitutional in the *Baltic Mining Company* v. *Massachusetts*, 231 U. S. 68, and

> *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147.

The Acts of 1914, Chap. 724, exacted from foreign corporations, having a capital in excess of $10,000,000 and paying a tax of $2,000 under the 1909 Act, an additional tax of 1/100 of 1 per cent of such excess. This Court held that the 1914 Act removed the $2,000 limitation of the 1909 Act, thus making the entire system of excise taxation unconstitutional.

> *International Paper Co.* v. *Commonwealth of Massachusetts*, 246 U. S. 135.

The Commonwealth has never objected to the decision of the *International Paper Co.* v. *Commonwealth of Massachusetts*, supra, but has objected to the Locomobile decision, 246 U. S. 147, upon the ground that the tax of the Locomobile Company was less than $2,000 and was, therefore, not affected by the maximum limitation of $2,000. The Commonwealth filed a motion for re-argument of the Locomobile case, which was denied.

After the decision of *Liquid Carbonic Company* v. *Commonwealth of Massachusetts*, 232 Mass. 19, by which the plaintiff recovered a tax of $1,100 paid in January, 1918, the Commonwealth filed a petition for writ of certiorari, which was not allowed.

> *Liquid Carbonic Company* v. *Commonwealth of Massachusetts*, 249 U. S. 603.

In the brief filed with the petition for the Commonwealth by the present attorney for the plaintiff in error, then

assistant attorney general of Massachusetts, the arguments now presented by the plaintiff in error were all elaborately stated to the effect that the 1909 law was constitutional and separable from the 1914 law and should be upheld even if the 1914 Act was unconstitutional. They have, therefore, been recently considered by this Court.

By the decision in *Liquid Carbonic Company* v. *Massachusetts*, 232 Mass. 19, the Massachusetts Court followed the decision of this Court in *Locomobile Company* v. *Massachusetts*, 246 U. S. 146, that both statutes together violated the right of the petitioner under the Constitution of the United States, and in *Lawton Spinning Company* v. *Commonwealth of Massachusetts*, 232 Mass. 28, at 34, the Massachusetts Court followed its decision and said:

> ". . . Said Sec. 56 and said c. 724, after the enactment of the latter, constituted together a single scheme for the taxation of foreign corporations. . . . The other, although not in form an amendment to the earlier act, introduced an unconstitutional element into the scheme of taxation."

As a result of these decisions all questions are now finally settled as to the unconstitutionality of these taxes. Neither the plaintiff in error nor the Commonwealth had any right to receive or retain these monies paid in terror of penalties provided in the statute.

A large number of corporations similar to defendants in error, which not only filed their petitions but also served on the treasurer and attorney general within six months of the payment of the tax, have recovered the taxes paid by them.

See *Lever Brothers Co.* v. *Commonwealth*, 232 Mass. 22.
Philadelphia & Reading, etc., v. *Commonwealth*, 232 Mass. 22.

Following the decision in *International Paper Co.* v. *Burrill*, 260 Fed. Rep. 664, in favor of the plaintiff, the Legislature of Massachusetts passed Acts of 1920, Chap. 462, making an offer of settlement to those corporations having a capitalization of over $10,000,000 which would sign a release of all demands against the Commonwealth and the officers of the Commonwealth on account of these taxes (Appendix, page 43).

BRIEF OF ARGUMENT

The defendants in error contend:

I. The plaintiff in error cannot take advantage of the state's immunity from suit as these are not suits against the state.

II. Taxes paid involuntarily under implied duress to the state treasurer may be recovered in an action for money had and received against him.

A. The taxes paid by the Locomobile Company may be recovered, although the payment was not accompanied by a written protest.

B. The taxes paid under protest by the Russell-Miller Milling Company are recoverable, notwithstanding the plaintiff in error was not notified that he would be held personally liable.

III. The provisions of the Massachusetts statutes imposing severe penalties for non-payment of these taxes and for delay in filing returns constitute implied duress.

IV. The exclusive remedy provided by the State Legislature to recover these taxes by way of petition in the State Supreme Court cannot oust the jurisdiction of the Federal courts.

ARGUMENT

I

THE PLAINTIFF IN ERROR CANNOT TAKE ADVANTAGE OF THE STATE'S IMMUNITY FROM SUIT, AS THESE ARE NOT SUITS AGAINST THE STATE.

SUIT AGAINST AN INDIVIDUAL WHO HAS UNLAWFULLY COLLECTED TAXES, UNDER THE PROFESSED AUTHORITY OF AN UNCONSTITUTIONAL STATUTE, IS NOT A SUIT AGAINST THE STATE, IN SPITE OF THE FACT THAT HE IS THE STATE TREASURER AND IS AUTHORIZED, IN HIS OFFICIAL CAPACITY, TO COLLECT ALL ASSESSMENTS DUE TO THE STATE.

It is not disputed that the state has absolute immunity from suit without its consent under the Eleventh Amendment, either in its own or in the Federal courts, and in certain well-defined classes of cases officials when sued personally may take advantage of the state's immunity when called upon to "do any affirmative act, which affects the state's political or property rights." These exceptional cases have no application here.

Where, however, as here, a state official has unlawfully collected taxes, acting under the professed authority of the unconstitutional statute, he cannot take advantage of the state's immunity from suit, but is personally liable for his unlawful collection of taxes or other unlawful acts, because his alleged authority from the state is null and void, and furnishes him no protection from personal suit any more than any other wrongdoer.

Sage v. *United States*, 250 U. S. 33, 37.
Ex parte Young, 209 U. S. 123.

Hopkins v. *Clemson College*, 221 U. S. 636, 642, 644.

Western Union Tel. Co. v. *Andrews*, 216 U. S. 165, 166.

Looney v. *Crane Co.*, 245 U. S. 178, 191.

Home Telephone & Tel. Co. v. *Los Angeles*, 227 U. S. 278, 293.

Atchison Ry. v. *O'Connor*, 223 U. S. 280.

Ludwig v. *W. U. Tel. Co.*, 216 U. S. 146.

Herndon v. *Chicago R. I. & Pac. Ry.*, 218 U. S. 135, 155.

Poindexter v. *Greenhow*, 114 U. S. 270.

Truax v. *Raich*, 239 U. S. 33, 37.

Philadelphia Co. v. *Stimson*, 223 U. S. 605, 607, 620.

Johnson v. *Lankford*, 245 U. S. 541.

Greene v. *St. Louis & Interurban R.R. Co.*, 244 U. S. 499.

Nevada-California Power Co. v. *Hamilton*, 235 Fed. 317.

Agassiz v. *Trefry, Tax Com'r.*, 260 Fed. 226.

Recent opinions have exhibited some impatience at the continued raising of this point.

As stated by Mr. Justice Pitney,

> "In repeated decisions since *Ex parte Young*, that case has been recognized as setting these questions at rest."
>
> *Greene* v. *St. Louis & Interurban R.R. Co.*, 244 U. S. 499–507.

Chief Justice White said, in a decision involving an unconstitutional tax and following which the Massachusetts excise was held to be unconstitutional,

"But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities."

Looney v. *Crane*, 245 U. S. 178, 191.

Unconstitutional excises on foreign corporations are recoverable by an action at law against state officials, when collected through duress.

Gaar, Scott & Co. v. *Shannon*, 223 U. S. 468.
Atchison Ry. v. *O'Connor*, 223 U. S. 280.

These two undisputed decisions are decisive of the cases at bar.

See also *Ward* v. *Board of County Commissioners of Love County*, 253 U. S. 17.

Many of the cases cited above involve unconstitutional excises on foreign corporations, which officials were enjoined from collecting.

Looney v. *Crane Co.*, 245 U. S. 178 (and cases cited).

It is expressly stated in some of the above decisions that the official who is acting under an unconstitutional statute is personally liable for the "damage inflicted," and incurs the "liability" of a "principal tort feasor."

Hopkins v. *Clemson College*, supra.
Nevada-California Power Co. v. *Hamilton*, 235 Fed. 317.

II

TAXES PAID INVOLUNTARILY UNDER IMPLIED DURESS MAY BE RECOVERED IN ACTION FOR MONEY HAD AND RECEIVED.

A. It is elementary that taxes voluntarily paid cannot be recovered, unless a remedy is provided by statute.

Protest does not render the payment any less voluntary.

> *Nevada-California Power Co.* v. *Hamilton*, 235 Fed. 317, 336.
>
> *Magee* v. *Salem*, 149 Mass. 238, 242.

In the absence of a statute requiring it as a condition of recovery, it is evident that protest is an inconsequential factor.

Addition of the element of duress alters the case. This is the essential factor.

It is completely settled that an unconstitutional tax on foreign corporations may be recovered, if paid under duress, even if there be no statutory remedy.

> *Ward* v. *Board of County Com'rs of Love County*, 253 U. S. 17.
>
> *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468.
>
> *Atchison Ry.* v. *O'Connor*, 223 U. S. 280.
>
> *Swift & Co.* v. *U. S.*, 111 U. S. 22, 29.
>
> *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17, 23.
>
> *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329.
>
> *Arkansas Building Assn.* v. *Madden*, 175 U. S. 269, 273.

If protest accompanies the duress, nothing is added. If not, the duress by itself enables recovery of the tax because the payment is not voluntary. The protest is at most some

evidence that the tax is involuntary. As Judge Anderson said, in *International Paper Co.* v. *Burrill*, 260 Fed. Rep. 664,

> "Duress, express or implied, may make protest unnecessary."

The settled common law of Massachusetts is here authoritative.

> *Burgess* v. *Seligman*, 107 U. S. 20, 33.
> *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 583.

The rule was thus stated by Chief Justice Shaw, in *Lincoln* v. *Worcester*, 8 Cush. 55, 61, and has never been departed from.

> "If, therefore, he pays, *with or without protest*, to avoid such duress, he may recover the money back, if he is not liable."

The materiality of a protest, except under certain statutory provisions, is with reference to fixing of the date when interest begins. It is now the settled rule that "taxes illegally assessed may be recovered with interest from the time of payment, if paid under protest, and from the time of demand, if paid without protest."

> *Boott Cotton Mills* v. *Lowell*, 159 Mass. 383, 386.
> *Shaw* v. *Beckett*, 7 Cush. 442, 445.
> *Boston, etc.* v. *Boston*, 4 Met. 181, 190.

A "protest" is often essential in application for a partial abatement of taxes filed under statutes which require

a written protest and also in the limited line of customs and internal revenue cases relied on by the defendant.

No case has been or can be cited where, in cases of duress, the absence of a protest has been regarded as converting an involuntary payment into a voluntary one or as barring recovery.

A payment made through duress is obtained through force which overcomes the will of the taxpayer. It is, therefore, involuntary. It becomes no less involuntary if a protest be omitted. Nor does it become more involuntary if a protest be added.

It is completely settled by the Massachusetts decisions that payments of taxes made under duress can be recovered, whether or not paid under protest.

Boston & Sandwich Glass Co. v. *Boston*, 4 Met. 181.
Lincoln v. *Worcester*, supra.
Boott Cotton Mills v. *Lowell*, supra.
Amesbury Woolen Co. v. *Amesbury*, 17 Mass. 461.
Dow v. *First Parish*, 5 Met. 73.

In *Boston & Sandwich Glass Co.* v. *Boston*, supra, the precise question now raised was decided. This decision has never been questioned.

It was there decided that, in cases of duress, unlawful taxes may be recovered back from cities and towns in an action for money had and received without a protest of any kind. In that case illegal taxes were claimed to be recovered for the years 1826 to 1839. Only the tax of 1839 was protested.

The Court said,

> "The taxes for the years preceding 1839 were paid by the plaintiff, *without making any objection at the*

time, the plaintiff and defendant supposing them to be rightly *assessed*" (pp. 182, 183).

All the payments were held to be under duress because made to a collector pursuant to his warrant authorizing the seizure and sale of the taxpayer's property. Judgment was rendered for the repayment of all taxes paid within six years next preceding suit and, therefore, not barred by the statute of limitations, including interest where the payment was protested.

The Court (p. 189) stated that the present question had previously been determined by

> *Amesbury Woolen Co.* v. *Amesbury,* 17 Mass. 461.

In the latter case payments of taxes made under a warrant of distress for the years 1814 to 1818 were recovered although there was no protest except in the case of the 1818 tax.

It was there "insisted that the payments, for the years preceding 1818, were voluntary, and, being such, the plaintiffs could not recover the money thus paid, although it was made to appear that such taxes were illegally demanded" (Boston & Sandwich case at p. 189). But the Court held otherwise.

Chief Justice Rugg, in *Marconi Wireless Co.* v. *Commonwealth of Massachusetts,* 218 Mass. 558, 563, after considering the severe penalties and summary remedies of this Massachusetts foreign corporation statute, held that suit could be brought without preliminary protest.

The law is the same in other jurisdictions.

> Judson on Taxation, 2d Ed., Sec. 651.
> *Cox* v. *Welcher,* 68 Mich. 263.
> *White* v. *Millbrook,* 60 Mich. 532, 539.

Howard v. *Augusta,* 74 Me. 79.
Yates v. *Royal Ins. Co.,* 200 Ill. 202.

The Federal decisions upon the point are to the same effect as the Massachusetts decisions. Thus it has been held that "illegal fees exacted by a collector, though sanctioned by long continued usage and practice in the office, under a mistaken construction of the statute, *even when paid without protest,* might be recovered back (from the collector), on the ground that the payment was compulsory and not voluntary."

Ogden v. *Maxwell,* 3 Blatch. 319, followed in *Swift* v. *United States,* 111 U. S. 22, 29.

B. The Russell-Miller Milling Company filed protests with the checks sent in payment of these taxes (Rec. p. 8).

The defence of the plaintiff in error to the Russell-Miller Milling Company suit is that he was not notified that he was to be held personally liable and turned the funds over to the state.

Even if it could be shown that a particular kind of notice must be served upon the collector, to the effect that the taxpayer intends to hold the collector personally liable (*Elliott* v. *Swartwout,* 10 Pet. 137, and other cases cited by the defendant), the Federal decisions cannot effect the settled common law rule of the state of Massachusetts.

All the Federal cases cited upon this point, however, involve purely voluntary payments made in order to release goods held for import duties which can hardly be said to constitute duress. No case has been cited in support of the proposition that a protest is necessary in cases of duress either to hold the principal or the agent.

If not even an ordinary protest is essential to recover against the collector in cases of duress, it necessarily follows that a special and elaborate form of notice need not

be given to him as claimed by the plaintiff in error in order to hold him personally liable.

Cunningham v. *Munroe*, 15 Gray, 471, * is in point. In that case a superintendent of alien passengers accompanied by a police officer for the purpose of enforcing obedience to his orders went upon a vessel arriving with alien passengers and demanded head money on these passengers under color of his office but without lawful authority and informed the master that if he did not comply with the demand he could not land his passengers and gave him a receipt in behalf of the Commonwealth for the head money. These payments were made by the plaintiff under protest, as appeared by endorsements made by the superintendent on the receipts, but no notice or intimation was given the defendant that he would be personally liable.

The Court held that the payments were made by compulsion and that the owner of the vessel might maintain an action to recover them from the superintendent.

The necessity of notice, in order to hold the agent, is confined to voluntary payments made to the agent *without duress*. The Court, in *Elliott* v. *Swartwout*, supra, expressly approves the distinction "that the cases which exempt an agent when the money is paid over to his prin-

* (The head note in this case is erroneous in stating that the owner of the vessel might maintain an action to recover the payments from the superintendent which remained in his hands. An examination of the full report in this case shows that the head money which was turned over to the Commonwealth was paid by the plaintiff without duress or constraint or protest, and, therefore, in any event could not be recovered from the superintendent. The reason why it was not recovered was not because it was turned over to the Commonwealth by the superintendent but because it was collected by the superintendent without duress. The money paid in the year 1849 which was recovered in this case was paid under compulsion and the plaintiff was allowed to recover this though no notice was given to the superintendent in addition to the protest.)

cipal *without notice* do not apply to cases where the money is paid by *compulsion,* or extorted as a condition &c."

Elliott v. *Swartwout,* 10 Pet. 137, 158.

The absence of notice to the agent not to pay over the money has uniformly been held not to constitute a defence in cases of duress although he has paid it over to the principal.

See Meachem on Agency, 2d Ed., Sec. 1440, and cases cited.

Bochino v. *Cook,* 67 N. J. Law, 467.
Messer Moore Ins. Co. v. *Trotwood Park Land Co.,* 170 Ala. 473.

In *Townson* v. *Wilson,* 1 Campbell, 396, which was a case of duress, it is said by Lord Ellenborough,

> "If any person gets money into his hands illegally, he cannot discharge himself by paying it over to another."

Cary v. *Curtis,* 3 How. 236, is much relied upon for the proposition that it requires a ruling that the common law of Massachusetts has been so modified by statute (that of 1909 giving a remedy against the Commonwealth by equity petition) as to abolish the cause of action which the plaintiffs in these cases are seeking to enforce.

But that decision contained nothing whatsoever bearing upon the defendant's claim that a new equity remedy granted to sue the state completely abolishes the substantive right at common law to sue the agent in cases of duress for payments made to his principal under an unconstitutional statute, whether he was warned against paying over the same or not.

It merely decided that a constitutional statute of the United States which required the collector to pay over his collections to his principal protected him from suit, although prior to the statute he was personally liable upon general principles of agency, where he had received notice not to pay over to his principal.

He had no option to return or repay the illegal taxes. Consequently a promise to repay the plaintiff could not be implied in the face of a lawful statute creating an obligation and implied promise to pay it to the United States.

The decision would necessarily have been the reverse, if, as here, the statute requiring payment had been unconstitutional.

> "A void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to *justify under them*, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit."
>
> *Hopkins* v. *Clemson College*, 221 U. S. 636, 644.

Here an unconstitutional statute required the tax to be paid "to the treasurer and receiver general, for the use of the commonwealth" (Sec. 56, Part III, Chap. 490, Acts 1909).

The requirement of payment over by him was a nullity.

The trust for the benefit of the Commonwealth could not have been enforced. He should have returned the money.

If he deposited it in his bank account, or in that of the Commonwealth, it still belonged to the real owner. It formed no part of the state's treasury. It might at any time have been withdrawn by him upon his own check and repaid to the real owner, without any warrant of the Governor and Council which, of course, is required only

in case of funds really belonging to the "treasury." He received the money in trust for the real owner. He had no business to pay it over to his principal. He committed a tort in collecting the tax, as also in paying it over to his principal. Paying it over to the principal under an unconstitutional statute constituted no defence to an action against the agent, whether notice was given to him to hold the funds or not. He clearly could not have been held liable on his bond if he had withdrawn funds from the treasurer's bank account and repaid these illegal taxes to the plaintiffs which the state could not require him to pay over to it.

He is presumed to know the law. He, therefore, knew that all his actions were unlawful. He had received specific notice of the plaintiff's claims as to unconstitutionality and the grounds therefor through the service upon him of a copy of the plaintiff's similar petition in the suit for the previous year's tax.

A direct demand upon his principal, stating the constitutional grounds, was made in the equity petition originally filed to recover the present tax. He is presumed to know the law that he could be held personally liable, if he acted under the void authority of the statute.

It is inconceivable upon what reasonable ground he any more than any other wrongdoer should claim that he should have received specific notice at the time of his various tortious and unlawful acts that he would be held liable therefor.

He claims that he should not be personally liable because he paid the taxes into the treasury of the Commonwealth and cites the Constitution of the Commonwealth to show that he had no right to remove said funds from the treasury without a warrant under the hand of the governor (Chap. II, Sec. 1, Art. XI).

If he wrongfully collected the money and wrongfully

turned it over to the state, it is hard to see how he is relieved, because he disposed of the money so that he cannot get it.

In *Ward* v. *Love County*, 253 U. S. 17, at 24, the Court said:

> "If it be true, as the supreme court assumed, that a portion of the taxes was paid over, after collection, to the state and other municipal bodies, we regard it as certain that this did not alter the county's liability to the claimants. The county had no right to collect the money, and it took the same with notice that the rights of all who were to share in the taxes were disputed by these claimants, and were being contested in the pending suits. In these circumstances it could not lessen its liability by paying over a portion of the money to others whose rights it knew were disputed and were no better than its own. *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280, p. 287. In legal contemplation it received the money for the use and benefit of the claimants, and should respond to them accordingly."

Further the record shows that he could have drawn the money out of the bank at any time even after the suit was brought.

> "They (checks upon the account standing in the name of the Commonwealth, Charles L. Burrill, Treasurer, signed by the Treasurer) are paid by the bank without other signature or authority" (Rec. No. 98, p. 6).

It was his duty to repay these taxes and it is inconceivable that he would be under liability if he did so.

In *Atchison, T. & S. F. R. Co.* v. *O'Connor*, supra, the Court said:

> "The other question is whether the defendant is liable to the suit. The defendant collected the money, and it is alleged that he still has it. He was notified

when he received it that the plaintiff disputed his right. If he had no right, as he had not, to collect the money, his doing so in the name of the state cannot protect him. *Erskine* v. *Van Arsdale,* 15 Wall. 75, 21 L. Ed. 63. See *Poindexter* v. *Greenhow,* 114 U. S. 270, 29 L. Ed. 185, 5 Sup. Ct. Rep. 903, 962. It is said that the money, as soon as collected, belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the state, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the state should attempt to hold him after he had been required to repay the sum."

Elliott v. *Swartwout,* supra, and the similar cases, which are the sole reliance of the defendant, have no application here for the following reasons:

(1) They are not cases of duress.

(2) They involve no question as to whether taxes paid under duress must be protested, in order to be recovered.

(3) They involve only an application of the law of agency, to the effect that, in case of purely voluntary payments to an agent, he is personally protected, if he pays the money over to his principal, unless he is notified not to do so. This principle, as the Court says in *Elliott* v. *Swartwout,* supra, is never applied to cases of payments made to an agent through duress.

(4) This special line of cases is limited to customs and internal revenue cases, so far as it seems to hold that protest creates liability and is necessary therefor. It has no general application even to taxes paid voluntarily, and certainly not to taxes paid under duress.

(5) They involved excessive duties, like petitions for abatement of taxes, where some reasons, at least, can be given for claiming that a taxpayer should assert his claim seasonably, without waiting for six years, and thus cause the Government to lose its evidence. Such cases can have no application to unconstitutional taxes, where they are paid under duress, for the collector must be presumed to know that they are illegal, that he has no right to collect them and is committing an unlawful act in so doing.

(6) Except in this limited class of cases it is doubtful whether a protest is ever of any importance, except under statutes requiring it or for the recovery of interest.

A distinction is claimed between the effects of "actual duress" and "implied duress" in that the treasurer did not actually put in force or threaten to exercise the penalties and forfeitures prescribed by statute. No case is cited in support of such a distinction.

The Supreme Court has expressly rejected the distinction as follows:

> "Now, it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be by actual violence, or any physical duress.
>
> "It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property (or, as here, to avoid the penalties and forfeitures), except by submitting to the payment."
>
> *Maxwell* v. *Griswold*, 10 How. 242, 256.

Approved in

Swift Co. v. *United States*, 111 U. S. 22, 29, and cases cited.

The plaintiff in error attempts to excuse himself by claiming that the checks may have been handled by one of the subordinate employees appointed under statutory authority. It is clear, however, that the deputy was appointed by the treasurer and subject to his order and control (see Record No. 98, p. 6; Revised Laws, Chap. 6, Sec. 4, now General Laws, Chap. 10, Sec. 5).

III

THE EXTREMELY SEVERE PENALTIES IMPOSED BY THE MASSACHUSETTS FOREIGN CORPORATION STATUTES CONSTITUTE IMPLIED DURESS.

THE GAAR, SCOTT AND ATCHISON RAILWAY CASES ARE DECISIVE, FOR THE MASSACHUSETTS STATUTES ARE FULLY AS SEVERE, THREATENING AND DRASTIC AS THE TEXAS AND COLORADO STATUTES THERE INVOLVED.

The provisions of the Massachusetts Foreign Corporation statutes are extremely severe in their requirements and in the penalties provided for the non-compliance therewith.

The similarity of the Massachusetts and the Colorado statutes was commented on by Chief Justice Rugg in *Marconi Wireless Telegraph Company* v. *Commonwealth*, 218 Mass. 558, 562, when he stated the result of the Atchison decision:

> ". . . The cases at bar in this respect come within the principle applied to a somewhat similar state of facts in *Atchison, Topeka & Santa Fe Railway* v. *O'Connor*, 223 U. S. 280, where it was held that a foreign corporation paying an excise tax was not acting voluntarily in a legal sense but was under implied duress when it was put to a serious disadvantage

against the sovereignty by reason of liability to heavy penalties if in the end its contention for exemption should not be sustained. Severe penalties are provided by Sec. 73 for each day's delay in filing returns, and by Sec. 74 the business of the corporation may be enjoined, while by St. 1903, c. 437, Sec. 60, the delinquent corporation is denied the privilege of maintaining actions in our courts. Somewhat summary remedies are given in the event of a failure to pay the tax. See St. 1909, c. 490, Part III, Secs. 58, 62, 69. The provisions of Sec. 70 under which these petitions are brought is that relief may be had by any corporation within six months after paying the tax, which shall be the exclusive remedy. It does not require any preliminary protest or statement of objection before filing the petition."

The penalties provided in the statute for failure to pay the tax leave no reasonable choice of action to the corporation. It is to be observed that payment of the unconstitutional tax and the filing of the annual return are completely coupled together. The statute provides that the return cannot be filed until the tax has been paid.

St. 1909, Chap. 490, Part III, Sec. 56 (infra, p. 38).

Different penalties attached to the failure to file the return apply equally to non-payment of the tax because of the provision last referred to. The corporation cannot compel a judicial determination of the validity of the disputed tax before payment, but in all cases is forced either to pay the tax or to take extreme risks however plainly the tax may appear to be unconstitutional.

The penalties provided in the statute for failure to pay the tax include

(1) A 12 per cent interest charge until the tax is paid. St. 1909, Chap. 490, Part III, Sec. 60 (infra, p. 40).

(2) The corporation is subject to maximum penalties of $200 per day until the return is made and the taxes paid.

The Act provides that if the foreign corporation omits

file its certificate within thirty days after the final djournment of its annual meeting but not more than three onths after the date fixed in the by-laws for said meeting e Tax Commissioner shall give notice to the corporation, d if said corporation fails to file such certificate within irty days after such notice of default it shall forfeit to e Commonwealth not less than $5 nor more than $10 f... ch day for fifteen days after the expiration of said thirty ys and not less than $10 nor more than $200 for each y thereafter during which such default continues.

If it took two years to reach the Supreme Court the max-aum penalty which the corporation might have to pay ould be $146,000 and the minimum $7,300 under this ction.

Ibid., Sec. 62 (infra, p. 40).

(3) The attorney general at the relation of the treas-rer may proceed by way of information in equity and may otain an injunction restraining the corporation from ansacting any business within the state.

Ibid., Sec. 62 (infra, p. 40).

(4) The treasurer may issue his warrant to the sheriff bstantially in the form of those issued by assessors of wns authorizing the seizure and sale of the corporation's roperty. Interest at the rate of 12 per cent can be col-cted on the warrant from the time when such tax be-ame due.

Ibid., Sec. 69 (infra, p. 41).

It was the issue and threatened service of such warrants assessors of towns which was held to constitute duress many of the early cases referred to previously in this ief, and a municipal corporation or similar body was cordingly held liable to pay back such tax, although the ress was exercised by some third party such as collector taxes or sheriff.

(5) An information in equity may also be brought in the

name of the attorney general at the relation of the tax commissioner "restraining the further prosecution of the business of the corporation named therein until such penalties or forfeitures (but not taxes), with interest and costs, have been paid and until the returns and certificates required by this act have been filed."

Ibid., Sec. 58 (infra, p. 39).

These penalties provided in Secs. 58 and 62 are immediate risks for the state court almost invariably sustains the validity of the local tax statutes against claims raised under the Federal Constitution. The Supreme Court may ultimately declare the taxes to be clearly and unmistakably unconstitutional, but meanwhile the corporation has severely suffered by losing its entire local business in Massachusetts for a period of two years or more until the final adjudication of the disputed tax.

Payment of the tax under threat of these certain risks and damages is obviously made under compulsion and implied duress. Payment could not be refused by any prudent corporation which realized the risks attending its refusal. The sheriff's warrant authorizes seizure of property. The high rate of interest is fixed. The money penalties are self-operating within certain limits. The penalty of an injunction against continuing business is practically certain and self-operating in view of the almost invariable practice of issuing injunctions at the request of the attorney general.

The plaintiff in error himself could set in motion all the most important remedies. In certain cases the tax commissioner had duplicate authority, but in the main the important powers were in the hands of the treasurer. He could himself start the proceedings and the implied duress was wholly exercised by the plaintiff in error, acting under the severe statutory provisions authorizing him to initiate their performance.

However, we must not be understood as assenting to the proposition that duress must be exercised by the plaintiff in error himself to enable the plaintiff to recover. The authorities are decisively to the contrary.

Atchison Rwy. v. *O'Connor*, 223 U. S. 280.
Gaar, Scott & Co. v. *Shannon*, 223 U. S. 468.

In each of these cases the Secretary of State was held liable because he collected the tax. He did nothing. He threatened nothing. He had no authority as the treasurer had here to set in motion drastic remedies to enforce severe statutes and to collect the taxes thereunder. In the above cases the only official who had anything to do with setting in motion proceedings to collect the tax was the attorney general. The liability of the collecting official arose from the severity of self-operating statutes, which was held to constitute implied duress wholly irrespective of any consideration as to who was to enforce the statutes in this respect. These cases are, therefore, much weaker than the present ones.

In the Atchison case, the Colorado statute (Acts 1907, Chap. 211) provided (Sec. 3) that every foreign corporation which failed to pay the tax should be liable to an "action of debt to be commenced by the attorney general, and proof of notice of liability for such tax from the Secretary of State shall not be necessary to the prosecution of such suit."

Section 7 provides that an additional 10 per cent shall be added to the tax for each six months' delay in payment.

In addition to the action of debt and the 10 per cent penalty the attorney general (Sec. 8) may commence an action of *quo warranto* to suspend the right of any delinquent corporation to carry on business within the state.

It is apparent in the Atchison case that it was not the Secretary of State who had power to initiate the remedies

before the attorney general but in reality it was the statutes themselves and not the acts or threatened acts of any official which were held to constitute the implied duress.

The Atchison case is also weaker than the present one because under the statutes (Sec. 6) the Secretary of State was obliged within thirty days to turn his collections over to the state treasurer. Here the agreed facts show that at the time of bringing suit the funds were still within the control of the defendant and subject to his check. The defendant could at any time draw his money out and repay the plaintiff with impunity. As the Court said in the Atchison case, at page 287,

> "It would be inconceivable that the state should attempt to hold him after he had been required to repay the sum."

Similar considerations apply to the Texas statute in the Gaar, Scott case. The Secretary of State, who collected the tax, had no authority to enforce the remedies which were exclusively under the control of the attorney general. The statute added 25 per cent to the amount of the tax as a penalty for non-payment. Under the Texas statute, the Secretary of State had the authority to declare the forfeiture of the right to do business "without judicial ascertainment." This provision, as the Supreme Court pointed out (p. 286) could apparently have been enforced only by *quo warranto* brought by the attorney general. There was no provision, as in our statute, for the issue of temporary injunctions.

In the case of *Ward* v. *Board of Commissioners of Love County*, 253 U. S. 17, this Court held that the right of the collector to sell lands for taxes and also to exact a penalty of 18 per cent for unpaid taxes were coercive means of collecting, and any payment made was made involuntarily.

IV

THE PROVISION THAT THE REMEDY BY PETITION IN THE STATE COURT SHALL BE EXCLUSIVE, CANNOT AFFECT THE MAINTENANCE OF THIS SUIT, WHERE THE FEDERAL COURT HAS JURISDICTION, NOT ONLY BECAUSE OF DIVERSE CITIZENSHIP, BUT ALSO BECAUSE THE FEDERAL CONSTITUTION IS INVOLVED.

The Massachusetts statutes involved (Sts. 1909, Chap. 490, Part III, Secs. 56–70, and Sts. 1914, Chap. 724, Sec. 2) both provide remedies to recover these taxes, by way of an equity petition to the Supreme Judicial Court for Suffolk County.

Each provides that the remedy in the state court "shall be exclusive."

It is not necessary to treat at length the claim of the plaintiff in error that this provision ousts the jurisdiction of this Court, which obviously has jurisdiction, both by reason of diverse citizenship of the parties and because of the Federal constitutional questions which are involved.

It is clear that "a State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts."

> *Smythe* v. *Ames*, 169 U. S. 466, 517.
> *Union Pacific R.R.* v. *County Commissioner*, 247 U. S. 283.
> *Nevada-California Power Co.* v. *Hamilton*, 235 Fed. 317, 339.

> "No Federal Court can hold that the right of foreign corporations or of other citizens of other states to recover money illegally obtained from them through the implied duress of statutes held unconstitutional

by the Supreme Court of the United States shall lie at the mercy of the Legislature of Massachusetts or of any other state."

International Paper Co. v. *Burrill,* 260 Fed. Rep. 664, 669.

In *Cunningham* v. *Macon, etc., R.R. Co.,* 109 U. S. 446, 452, the Court said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See *Mitchell* v. *Harmony,* 13 How. 115 (14 L. Ed. 75); *Bates* v. *Clark,* 95 U. S. 204 (24 L. Ed. 471); *Meigs* v. *McClung,* 9 Cranch, 11 (3 L. Ed. 639); *Wilcox* v. *Jackson,* 13 Pet. 498 (10 L. Ed. 264); *Brown* v. *Huger,* 21 How. 305 (16 L. Ed. 125); *Grisar* v. *McDowell,* 6 Wall. 363 (18 L. Ed. 863)."

The plaintiff in error places reliance on *Lambourn* v. *County Commissioner,* 97 U. S. 181, 185, and *Arkansas Building Assn.* v. *Madden,* 175 U. S. 269, 274, to the effect that the common law liability of the plaintiff in error can be destroyed provided a reasonable substitute is provided therefor. This Court in *Ward* v. *Love County,* supra, stated that the general statements in these cases have been modified by such later decisions as

Atchison, etc. v. *O'Connor,* supra.
Gaar, Scott & Co. v. *Shannon,* supra.

It should here be added that both Massachusetts Acts

have been decided to be unconstitutional as applied to foreign corporations like the plaintiff.

Certainly the remedy must fall when the tax itself is declared unconstitutional. This special provision making the statutory remedy "exclusive" falls as a part of the unconstitutional statute.

In *Harrington* v. *Glidden*, 179 Mass. 486 at page 492, Hammond, J., after reviewing many of the cases and the claim that the statutory remedy was exclusive, says:

> "These and similar cases all proceed upon the principle that an assessment made by assessors who have no jurisdiction is not the assessment authorized by statute. It is no assessment at all and is absolutely void. As it is not the statutory proceeding, the statutory remedy is not exclusive. Such an assessment, therefore, can be attacked collaterally in an action of tort against the assessors, where such an action will lie, or in an action against the town to recover back the money paid, or in defence to an action by the collector. These general remedies are not for those who are aggrieved by assessors acting within their jurisdiction, but are allowable to redress wrongs inflicted by persons who pretend to be assessors, but who are not such, because acting without jurisdiction."

Moreover, Chap. 724 of the Acts of 1914, including Sec. 2, which contains the provision that the remedy "shall be exclusive," was expressly repealed on March 18, 1918 (Acts 1918, Chap. 76), and can have no possible application here.

From any point of view there is no constitutional statute now in force affecting these taxes.

The plaintiff in error contends that the provision of this statute that "said petition shall be the exclusive remedy" must be construed entirely to abolish any personal liability of any description to which the treasurer and receiver general of the Commonwealth might have been sub-

ject at common law prior to its enactment. He contends that this provision can have no reference to any liability exclusive of this statute on the part of the Commonwealth, for, as a sovereign state, it could not be made subject to any suit without its express consent. Thus the plaintiff in error contends the other remedies which are excluded by this provision must be remedies to establish the personal liability of public officers or this language can have no meaning.

The plaintiff in error in making this claim has evidently forgotten that since 1879 the Superior Court was given jurisdiction of all claims at law or in equity against the Commonwealth.

Chap. 258, Sec. 1, General Laws, provides:

> "The superior court, except as otherwise expressly provided, shall have jurisdiction of all claims at law or in equity against the commonwealth. Such claims may be enforced by petition stating clearly and concisely the nature of the claim and the damages demanded, and such petition shall be served by the sheriff of Suffolk county or any of his deputies by leaving an attested copy thereof in the hands or in the office of the attorney general, and a like copy in the hands or in the office of the state secretary, thirty days at least before the return day thereof."

The obvious purpose of the legislature in using the language "said petition shall be the exclusive remedy" was to provide that these tax questions should be determined by the Supreme Court in the County of Suffolk. The statute above referred to stated that the Superior Court "except as otherwise expressly provided" shall have jurisdiction, etc. It is clear that the suit in the Supreme Court provided for was one of the exceptions referred to in Chap. 258, Sec. 1, of the General Laws, and that it was not the intention of the legislature to abolish any remedies against public officers.

CONCLUSION

In conclusion it is submitted that since these taxes are invalid that the plaintiff in error is under personal liability to repay to these defendants in error these taxes paid by them to him while he was treasurer of the Commonwealth of Massachusetts, because

(1) These taxes were paid under duress.

(2) The plaintiff in error knew when payments were made to him that defendants in error and other foreign corporations were contesting these taxes and protesting payment.

(3) Payments made under duress are recoverable whether made with or without protest.

(4) If necessary sufficient protest was made in the Russell-Miller Milling Company case.

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APPENDIX

MASSACHUSETTS FOREIGN CORPORATION TAX LAWS

Taxation of Foreign Corporations

ACTS 1909, CHAPTER 490, PART III

Annual certificate of condition

"SECTION 54. Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the secretary of the commonwealth, upon payment of the fee provided in section ninety-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, a certificate signed and sworn to by its president, treasurer, and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than ninety days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section forty-five of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section sixty of said chapter, made since the filing of said certificate or of the last annual report.

Approval of certificate

"SECTION 55. A certificate which is required to be filed by the preceding section shall be accompanied by a written statement under oath by an auditor, as provided in section forty-seven of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, except that such auditor shall in all cases be chosen by the board of directors. Before

it is filed it shall be submitted to the commissioner of corporation, who shall examine said certificate and shall as tax commissioner assess upon the corporation an excise tax in accordance with the provisions of the following section. If he finds that the certificate is in compliance with the requirements of the preceding section, he shall indorse his approval thereon; but no certificate shall be filed until he has indorsed his approval thereon, and until the excise tax required by the following section has been paid to the treasurer and receiver general.

Taxation of foreign corporations

"SECTION 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

Amendment of 1914

ACTS 1914, CHAPTER 724

Payment of excise tax by certain foreign corporations

"SECTION 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition.

"SECTION 2. All laws now or hereafter in force relating to the assessment and collection of the tax imposed by said section fifty-six and all laws providing for appeal from any assessment made under said section fifty-six or for the recovery of any tax assessed thereunder shall, except so far as they are inconsistent with the provisions of this act, apply to the tax imposed by this act." Certain existing laws to apply

Penalties

ACTS 1909, CHAPTER 490, PART III

"SECTION 58. If a domestic business corporation fails to file its tax return before the tenth day of May of each year, or if a foreign corporation omits to file the certificate as required in section fifty-four, the tax commissioner shall give notice by mail, postage prepaid, to the corporation of its default, directed, in the case of a foreign corporation, to the resident manager, if any, in the United States, or to any other person designated by the corporation, by written notice filed in the office of the commissioner, as provided in section fifty-nine of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three for notice of the service of legal process, which notice to said foreign corporation shall contain a copy of this section and of sections sixty-five to sixty-eight inclusive of said chapter. If such business or foreign corporation fails to file such return or certificate within thirty days after such notice of default has been given or mailed, it shall forfeit to the commonwealth not less than five nor more than ten dollars for each day for fifteen days after the expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter during which such default continues, or Penalties for neglect to make returns, and for false statements. Recovery thereof

any other sum, not greater than the maximum penalty or forfeiture, which the court may deem just and equitable, which, in the case of a foreign corporation, shall be recovered as herein provided.

"Penalties and forfeitures incurred by any domestic business or foreign corporation which, being subject to the provisions of this act, omits to cause any certificate or return which may be required by the provisions of sections forty and fifty-four to be duly filed may be recovered in an action brought in the county of Suffolk in the name of the commonwealth, or they may be recovered by an information in equity in the name of the attorney-general at the relation of the tax commissioner, brought in the supreme judicial court in the county of Suffolk. Upon such information, the court may issue an injunction restraining the further prosecution of the business of the corporation named therein until such penalties or forfeitures, with interest and costs, have been paid, and until the returns and certificates required by this act have been filed."

Interest on unpaid taxes

"SECTION 60. Corporations which neglect to pay taxes assessed and certified to the treasurer and receiver general by the tax commissioner shall pay interest at the rate of six per cent per annum from the time when such taxes were payable until they are paid, if such payment is made before the commencement of proceedings for the recovery thereof, and twelve per cent if made after the commencement thereof."

Collection of penalties and unpaid taxes by information

"SECTION 62. Penalties incurred by corporations, companies or associations, except domestic business and foreign corporations, for failure to make the returns required by sections eight, twenty-six, thirty-four, thirty-seven, thirty-eight, forty, fifty-two and

fifty-three, may also be collected by an information brought in the supreme judicial court by the attorney-general at the relation of the tax commissioner; and taxes under the provisions of sections twenty-one, twenty-four, thirty-eight, forty-three, fifty-two and fifty-three, may also be collected by a like information at the relation of the treasurer and receiver general. The court may issue an injunction upon such information, restraining the further prosecution of the business of such company or corporation until such penalties or taxes, with interest and costs thereon, have been paid, and the returns have been made; *and in the case of a domestic business or foreign corporation, taxes which are assessed under the provisions of this act may also be collected by an information brought in the supreme judicial court by the attorney-general at the relation of the treasurer and receiver general,* and the court may issue an *injunction upon such information, restraining the further prosecution of the business* of such corporation until such taxes, with interest and costs thereon, have been paid; but no telegraph company accepting the provisions of section five thousand two hundred and sixty-three of the Revised Statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth."

Warrants for Collection

"SECTION 69. When a tax or excise of any kind remains due to or is claimed by the commonwealth from a corporation, company or association, whether existing by authority of this commonwealth or otherwise, except a municipal corporation, for ten days after notice given through the mail by the treasurer

Collection of tax by warrant

and receiver general to its treasurer or other financial agent that such tax or excise is due and unpaid, the treasurer and receiver general may, in addition to other modes of relief, issue his warrant, directed to the sheriff or his deputies of the county in which such corporation, company or association has its place of business, commanding the collection of such tax or excise. Such warrant may be substantially in the form of and served in the same manner as those issued by the assessors of towns. Such warrant shall not run against the body of any person, nor shall any property of such delinquent corporation, company or association be exempt from seizure and sale thereon. The officer having such warrant shall collect such excise or tax, and interest upon the same at the rate of twelve per cent per annum from the time when such tax or excise became due, and may collect and receive for his fees the sum which an officer would be entitled by law to receive upon an execution for a like amount. He shall also collect one dollar for the warrant, which shall be paid over to the treasurer and receiver general."

Applications for Relief.

Validity of tax may be determined by supreme judicial court on petition

"SECTION 70. Any corporation or association aggrieved by the exaction of said tax or excise or of any portion thereof may, within six months after the payment of the same, whether such payment be after or before the issue of the warrant mentioned in the preceding section, apply by petition to the supreme judicial court, setting forth the amount of the tax or excise and costs thereon so paid, the general legal grounds and the specific grounds in fact, if any, upon which it is claimed such tax or excise should not have been exacted. Said petition shall be the exclusive remedy and shall be entered and heard in the county

of Suffolk. A copy of the same shall be served upon the treasurer and receiver general and upon the attorney-general. The proceedings upon such petition shall conform, as nearly as may be, to proceedings in equity, and an abatement shall be made of only such portion of the tax or excise as was assessed without authority of law. In case said tax or excise has heretofore been exacted or is hereafter exacted in consequence of any law or statute of any other state of the United States, then the application above provided for may be made at any time within six years after the exaction of said tax or excise or any portion thereof."

Compromise Offer made to Foreign Corporations by the Commonwealth of Massachusetts

ACTS 1920, CHAPTER 462

"SECTION 1. Any foreign corporation which has, after the first day of July, nineteen hundred and fourteen, paid to the commonwealth a tax or taxes for any one year or years in excess of two thousand dollars under the provisions of section fifty-six of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine or of chapter seven hundred and twenty-four of the acts of nineteen hundred and fourteen, and has not received a refund or abatement thereof, shall upon application therefor, as hereinafter provided, be entitled to an abatement in full of all such payments for any one year or years in excess of two thousand dollars, without interest.

"SECTION 2. Applications for the abatement aforesaid shall be filed with the commissioner of corporations and taxation within sixty days from the date on which this act takes effect. If the commissioner finds that any such payment has been made, he shall issue

a certificate of abatement. Upon the filing with the auditor of the commonwealth of such certificate, together with a release under seal, duly executed by the corporation and in a form approved by the auditor, of all claims against the commonwealth or any board, officer or employee thereof, for or on account of any tax or taxes paid to the commonwealth after the first day of July, nineteen hundred and fourteen, whether under said section fifty-six of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine, or under said chapter seven hundred and twenty-four of the acts of nineteen hundred and fourteen, the treasurer of the commonwealth shall pay to such corporation the amount called for by the said certificate."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 112.

JOHN L. WHITING—J. J. ADAMS COMPANY,
Plaintiff in Error,

v.

CHARLES L. BURRILL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD E. BLODGETT,
CHARLES L. FAVINGER,
WILLIAM P. EVERTS,
Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 113.

JOHN L. WHITING — J. J. ADAMS COMPANY,
PLAINTIFF IN ERROR,
v.
CHARLES L. BURRILL,
DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

A.

STATEMENT OF CASE.

This is an action for money had and received, brought by the plaintiff, a Maine corporation, to recover from Charles L. Burrill, the defendant, personally, certain taxes which the plaintiff was compelled to pay to said Burrill, while he was Treasurer and Receiver General of the Commonwealth of Massachusetts, under duress of various and drastic penalties, said taxes having been assessed on the plaintiff under certain provisions of the Statutes of Massachusetts alleged by the plaintiff to constitute an unconstitutional system of taxation.

The plaintiff had a place of business in Massachusetts

where it manufactured and from which it sold goods in local and interstate commerce (Record, bottom of page 9).

The taxes were levied under the Massachusetts Acts of 1909, Chapter 490, Part III, Section 56, and the Acts of 1918, Chapter 253. These acts, so far as material, are as follows:

Acts of 1909, Chapter 490, Part III, Section 56.

"Every foreign corporation shall, in each year, at the time of filing its annual Certificate of Condition, pay to the Treasurer and Receiver General for the use of the Commonwealth, an excise tax to be assessed by the Tax Commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual Certificate of Condition; but the amount of such excise tax shall not in any one year exceed the sum of Two Thousand Dollars."

Acts of 1918, Chapter 253.

"*Section 1.* Every foreign corporation, as defined in section thirty-nine of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine, shall pay a tax to the commonwealth computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States. Each corporation subject to the tax imposed by this act shall render to the tax commissioner, under oath or affirmation of its treasurer or assistant treasurer, on or before the first day of July in the year nineteen hundred and eighteen, unless the fiscal year of the corporation for which it made return to the collector of internal revenue ended between the thirtieth day of April and the first day of July, both inclusive, in which case the said report

shall be rendered by the corporation within sixty days after the date of the closing of its said fiscal year, a true copy of the last return made to the collector of internal revenue, of the annual net income arising or accruing from all sources in its fiscal or calendar year next preceding, stating the name and situation of the principal place of business of the corporation; the kind of business transacted, and a list of all subsidiary companies, if any, with the situation of the principal place of business of each; the gross amount of its income during the said year from all sources, and the amount of its ordinary necessary expenses paid out of earnings in the maintenance and operation of the business and properties of the corporation; such other information as may be requested by the United States treasury department for the purpose of ascertaining the total amount of net income taxable under the United States income tax act; the net income of the corporation after making the deductions authorized; the amount of taxes paid upon its income to the internal revenue department for the year next preceding the one for which such return is made.

Section 2. If the amount of the net income returned by any such corporation to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by any other official of the United States, such corporation, within ten days after the receipt of notification of the change or correction, shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. In case a corporation fails to file the return within the time prescribed, there shall be added to, and become a part of the tax, as an addi-

tional tax, the sum of five dollars for every day during which the corporation is in default. If any deduction is made from the net income as returned, the tax commissioner shall certify to the auditor the amount of any tax paid upon such deduction, and the treasurer and receiver general shall pay said amount without any appropriation therefor, or if any addition is made, the corporation shall, within thirty days after receipt of notice from the tax commissioner of the amount of such addition, pay the tax thereon.

Section 3. If any such corporation carries on business outside of this commonwealth, or owns property beyond its jurisdiction, or is to any extent engaged in interstate or foreign commerce, that portion only of its net income which is not derived from the said sources shall be apportioned to this commonwealth and taxed hereunder. Each corporation, in connection with the return required by section one of this act, shall state in such form as the tax commissioner shall prescribe what portion or amount of its annual net income is apportionable to this commonwealth, as provided in this section. A tax is hereby laid on every such corporation of one per cent of the said income to be assessed in the manner hereinafter provided.

Section 4. Sections four to nine, inclusive, of the general act of the current year, entitled 'An Act imposing an additional tax upon the net incomes of domestic corporations', shall apply to the taxes imposed by this act and to the enforcement of its provisions.

Section 5. The tax imposed by this act shall be construed as a temporary emergency tax levied in addition to all other taxes imposed on foreign corporations, and not to any extent as a part of the system of taxation established by sections fifty-four to fifty-six, inclusive, of Part III, of chapter four hundred

and ninety of the acts of nineteen hundred and nine and acts in amendment thereof or in addition thereto.

Section 6. This act shall take effect upon its passage and shall be operative for one year only. (Approved May 29, 1918.)"

It is to be noted that Section 3 of this act allows certain deductions from the income taxed based on the net income from (1) business done outside of the State, (2) property owned outside the State and (3) interstate or foreign commerce.

Concurrently with the passage of this statute there was enacted, as applying to domestic corporations, an act (Acts of 1918, Chapter 255) similar in many respects to Chapter 253 and imposing the same rate of taxation on income, but with discriminating deduction provisions with respect to business done outside of the State, whether done entirely within another State or in whole or in part in foreign and interstate commerce, the differences in the Act of 1918, Chapter 255, applying to domestic corporations, being as follows:

In Section 1, which otherwise corresponds with Section 1 of Chapter 253, there is added a provision for the following additional data to be inserted in the return:

"in case of a corporation which carries on business outside the commonwealth, the fair cash value of its real estate and tangible personal property in each city or town in this commonwealth, and the fair cash value of its real estate and tangible personal property located outside this commonwealth; in case of a corporation deriving profits principally from the holding or sale of intangible property, the gross receipts from its business within and without this commonwealth and the gross receipts from its business within this commonwealth."

And there is inserted in the place of Section 3 of the Act applying to foreign corporations the following as applying to domestic corporations:

> "If such corporation carries on business outside of this state, a portion of the net income on which the tax is imposed by the United States shall be apportioned to this state as follows: In case of a company deriving profits principally from the ownership, sale or rental of real estate, and in case of a corporation deriving profits principally from the sale or use of tangible personal property, such proportion as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such corporation in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of any incumbrance thereon; in case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this state for the year ending on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the state. In case neither of the above methods are applicable, the tax commissioner shall determine, in such manner as he deems equitable, the proportion of the net income received from business carried on within this commonwealth."

The Act of 1918 applying to foreign corporations (Chapter 253) expressly, in Section 4, incorporates Sections 4 to 9 of the Acts of 1918, Chapter 255, applying to domestic corporations, and Section 4 of Chapter 255 expressly in turn incorporates the collection powers given in Part III of Chapter 490 of the Acts of 1909. The powers and penalties under these acts are as follows:

By Section 4 of the Acts of 1918, Chapter 255, it is provided:

> "He (that is, the tax commissioner) shall certify to the correctness of said list, and said amounts, and deliver a copy thereof to the treasurer and receiver general, who shall collect such tax in the manner and with the powers provided in Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine;"

also:

> "Such tax shall be payable on or before the first day of October in the current year, and to any sum or sums due and unpaid after the said first day of October, after ten days' notice and demand thereon by the treasurer and receiver general, shall be added interest at the rate of six per centum per annum from the time when such taxes were payable until they are paid, if such payment is made before the commencement of proceedings for recovery thereon, and twelve per centum if made after the commencement thereof. In case of failure to make such return, or in case of false or fraudulent return, the tax commissioner, upon discovery thereof at any time within three years after the same is due, shall make a return of such net income, and a tax computed thereon shall be paid by such corporation upon notification of the amount thereof, and the treasurer and receiver general shall have the same powers of collection as given by said Part III."

The powers of collection given under Part III of Chapter 490 of the Acts of 1909 are as follows:

> "No certificate (that is, of condition) shall be filed until he (that is, the tax commissioner) has endorsed his approval thereon and until the excise tax required

by the following section (Section 56) has been paid to the treasurer and receiver general." (Section 55.)

"If such business or foreign corporation fails to file such return or certificate (that is, certificate of condition) within thirty days after such notice of default has been given or mailed, it shall forfeit to the commonwealth not less than five nor more than ten dollars for each day for fifteen days after the expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter during which such default continues, or any other sum, not greater than the maximum penalty or forfeiture, which the court may deem just and equitable, which, in the case of a foreign corporation, shall be recovered as herein provided.

"Penalties and forfeitures incurred by any domestic business or foreign corporation which, being subject to the provisions of this act, omits to cause any certificate or return which may be required by the provisions of sections forty and fifty-four (providing for return and certificate by a foreign corporation) to be duly filed may be recovered in an action brought in the county of Suffolk in the name of the commonwealth, or they may be recovered by an information in equity in the name of the attorney-general at the relation of the tax commissioner, brought in the supreme judicial court in the county of Suffolk. Upon such information, the court may issue an injunction restraining the further prosecution of the business of the corporation named therein until such penalties or forfeitures, with interest and costs, have been paid, and until the returns and certificates required by this act have been filed." (Section 58.)

"Corporations which neglect to pay taxes assessed and certified to the treasurer and receiver general by

the tax commissioner shall pay interest at the rate of six per cent per annum from the time when such taxes were payable until they are paid, if such payment is made before the commencement of proceedings for the recovery thereof, and twelve per cent if made after the commencement thereof." (Section 60.)

"When a tax or excise of any kind remains due to or is claimed by the commonwealth from a corporation, company or association, whether existing by authority of this commonwealth or otherwise, except a municipal corporation, for ten days after notice given through the mail by the treasurer and receiver general to its treasurer or other financial agent that such tax or excise is due and unpaid, the treasurer and receiver general may, in addition to other modes of relief, issue his warrant directed to the sheriff or his deputies of the county in which such corporation, company or association has its place of business, commanding the collection of such tax or excise. . . . The officer having such warrant shall collect such tax or excise, and interest upon the same at the rate of twelve per cent per annum from the time when such tax or excise became due, and may collect and receive for his fees the sum which an officer would be entitled by law to receive upon an execution for a like amount." (Section 69.)

The constitutionality of taxes levied under a statute of 1914 in conjunction with the 1909 statute, *supra*, was attacked in the case of

International Paper Company v. *Massachusetts*, 246 U. S. 135,

and the taxes were declared by this Court to be unconstitutional.

The contention in this case is that the system of taxa-

tion comprising the 1909 and 1918 statutes is equally unconstitutional with the system comprising the 1909 and 1914 statutes.

B.

Material Facts.

The plaintiff in error is a corporation organized under the laws of the State of Maine, doing in conjunction both an interstate and a local business in Massachusetts. On July 27, 1918, it filed with the Tax Commissioner a return of its income in compliance with the above quoted Act of 1918, and was assessed on the basis of this return a tax of $4,591.17. In compliance with the requirements of the 1909 statute, it filed a Certificate of Condition on October 3, 1918, with the Tax Commissioner, and thereupon received a certification of an excise tax of $480 alleged to be due under that statute, which purported to require the payment of the tax before the certificate could be filed. These taxes, amounting in the total to $5,071.17, were paid to the defendant in error, at that time the Treasurer and Receiver General of Massachusetts, without any protest other than such as may be implied in law, and the proceeds were by him deposited in an account of the Commonwealth which was under his control as such Treasurer and Receiver General not only when the deposit was made but when a petition was brought in the State Court to recover these taxes (Rec. p. 10).

In consequence of the decision in

American Printing Company v. *Commonwealth*, 231 Mass. 237,

$1,065.23 of the above amount, being one per cent of the plaintiff's excess profits tax paid to the Federal Government, was refunded to the plaintiff. It will be observed that the 1918 tax was computed, as a fact, on the basis of the net income from both interstate and intrastate busi-

ness, except as to the income received by the plaintiff in error from its real estate valued at $60,000, situated in New York, and that the plaintiff had $1,800,716.19 worth of tangible property in Massachusetts (Rec. p. 16) on which it was otherwise taxed on the *ad valorem* basis.

The plaintiff had a place of business in Massachusetts, but not elsewhere, where it manufactured its products which it sold and delivered both within and without the State from the same place of business, and by the same agencies and instrumentalities: a large part of the sales requiring transportation to and delivery in other States than Massachusetts (Rec. bottom of page 9).

C.

Specification of Errors.

THE PLAINTIFF IN ERROR SPECIFIES THE FOLLOWING ERRORS OF THE COURT BELOW UPON WHICH IT NOW RELIES.

1. In refusing to rule that the Massachusetts Acts of 1909, Chapter 490, Part III, Section 56, and Acts of 1918, Chapter 253, are unconstitutional and void because they and each of them violate the "Commerce" clause of the Federal Constitution (Rec. p. 20).

2. In refusing to rule that the said Acts constitute a "system" of taxation; that if one is unconstitutional, the other fails also; and that their combined practical effect in actual operation is the sole test of their validity (Rec. p. 20).

3. In refusing to rule that the $2,000 maximum limitation in the 1909 Act in its practical operation and effect was removed by the passage of the Act of 1918 in the same way as it was removed by Chapter 724 of the Acts of 1914, as held in *International Paper Company* v. *Massachusetts*, 246 U. S. 135 (Rec. p. 20).

4. In refusing to rule that upon all the evidence the plaintiff may recover (Rec. p. 20).

D.

The Issues.

On the foregoing statutes and facts, the issues of the case are:

1. Whether the Acts of 1909 and 1918 constitute an invalid system of taxation, considered either as a single system or as separate and independent statutes.

2. Whether, having established the unconstitutionality of the taxes levied under either or both of said statutes, the plaintiff in error is barred from recovery of the taxes, depending on

(a) Whether or not it was necessary to file a protest at the time when the taxes were paid.

(b) Whether recovery can be had against the defendant in error personally in an action for money had and received.

(c) Whether the statutes of Massachusetts provide an exclusive remedy for the recovery of taxes paid.

E.

BRIEF OF ARGUMENT.

Constitutionality of the Taxes.

I.

THE TAXES ARE UNCONSTITUTIONAL AND VOID UNDER THE "COMMERCE" CLAUSE OF THE FEDERAL CONSTITUTION.

(*a*) *The 1909 Act and the 1918 Act Constitute a System of Taxation in the Same Manner as the 1909 and 1914 Acts did.*

At the time when these taxes were assessed and collected both the 1909 (*supra*, p. 2) and the 1918 (*supra*,

p. 2) statutes were in full force and effect in Massachusetts. The 1909 statute imposed an excise tax of 1/50th of one per cent upon the par value of the authorized capital stock of foreign corporations maintaining places of business in Massachusetts not used exclusively in carrying on interstate commerce. But the total tax was limited to $2,000 in any one year. The statute of 1914, Chapter 724, was then enacted imposing an additional excise tax of 1/100th of one per cent upon all foreign corporations having an authorized capitalization in excess of $10,000,000. This 1914 statute did not purport to amend the 1909 Act, but referred to it for a description of the class of corporations included within its scope, and the method of assessment and collection, and it also provided that the tax imposed thereby was in addition to the tax under the 1909 Act.

In *International Paper Company* v. *Massachusetts*, 246 U.S. 135, this Court decided that with respect to the legislation consisting of these two statutes, "its operation and validity must be determined here by considering it as a whole", or as a "system" of taxation, and that the $2,000 limitation of the 1909 Act had been "removed" by the combined practical effect of the two acts.

With reference to this International Paper Company case and the decision in *Locomobile Co. of America* v. *Massachusetts*, 246 U.S. 146, the Supreme Court of Massachusetts has now said:

> "We thought that the conjoint operation of these two statutes upon such a foreign corporation having an authorized capital stock in excess of ten million dollars, and thus within the direct sweep of both statutes, was not obnoxious to any provision of the Constitution of the United States. *International Paper Co.* v. *The Com.*, 228 Mass. 101. But we were in error, and our judgment was reversed in *International*

Paper Co. v. *Mass.*, 246 U. S. 135. We also thought that Section 56 in its operation upon such foreign corporations with an authorized capital stock of less than ten million dollars was wholly unaffected by said Chapter 724, and was valid, regardless of the terms of the latter act. We expressed that view in *Locomobile Co. of America* v. *Commonwealth*, 228 Mass. 117. But we were in error on that point also, as was held in *Locomobile Co. of America* v. *Mass.*, 246 U. S. 146. In substance and effect that decision as we understand it was that an excise assessed while both statutes were in force upon a corporation within the direct effect of said Section 56 alone because having a capital stock of less than ten million dollars, was invalid under the United States Constitution. Since the announcement of these decisions by the United States Supreme Court, the Legislature of this Commonwealth had repealed statute 1914, Chapter 724, by the enactment of statute 1918, Chapter 76, which is directed solely to that end without any reference to said section 56 and which took effect on March 18, 1918, . . ."

Lawton Spinning Co. v. *Commonwealth*, 232 Mass. 28, at pp. 30, 31.

The Massachusetts Supreme Court then decided in this *Lawton* case that the 1909 Act, after the repeal of the unconstitutional statute of 1914, remained in full force and effect. Following the repeal of the 1914 Act, the Massachusetts Legislature passed the 1918 Act (*supra*, p. 2), so that when the taxes in the instant case were assessed and paid, the 1909 Act and the 1918 Act were both in full force. Since this Court in the *International Paper Company* and *Locomobile Company* decisions, *supra*, has declared that the 1909 and the 1914 Acts constituted

a system of taxation, the constitutionality of which must be judged on the basis of the "essential and practical operation" thereof, the 1909 Act in conjunction with the 1918 Act must also constitute a single system of taxation, notwithstanding the fact that they are separate and independent statutes. They must, therefore, be tested as to their constitutionality by their "essential and practical operation" as a single system. This result necessarily follows also from the fact that the 1918 statute, though not specifically purporting to impose an excise tax, nevertheless does impose such tax.

Brushaber v. *Union Pacific R. R.*, 240 U.S. 1, 14, 15.

So that we are confronted in the instant case with two statutes, each imposing an excise tax on the same classes of corporations in the same year. The test of the validity of these statutes must therefore be determined on the basis of their "essential and practical operation" in their combined effect.

International Paper Co. v. *Mass.*, 246 U.S. 135, 145.
Locomobile Co. of America v. *Mass.*, 246 U.S. 146.
Looney v. *Crane Co.*, 245 U.S. 178.

It must be noted, however, that Section 5 of the 1918 Act provides that it shall be construed as levied "in addition to all other taxes imposed on foreign corporations and not to any extent as a part of the system of taxation established by" the 1909 Act. But this declaration can have no effect whatever to control the judgment of this Court as to whether the two statutes do in actual operation and effect constitute a single system of taxation, nor can the form of the statute govern in this case. This Court is bound to exercise its own judgment as to the "actual operation and effect of the tax irrespective of the form it bears or how it is characterized by the State courts".

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 294.
Galveston, etc. Ry. Co. v. *Texas*, 210 U. S. 217, 227.
St. Louis, etc. Ry. Co. v. *Arkansas*, 235 U. S. 350, 362.
Kansas City Ry., etc., v. *Kansas*, 240 U. S. 227, 231.

Neither can a State, by legislative enactment, control the judgment of the United States Supreme Court as to whether a statute is an independent entity or a part of a system in its practical effect.

Galveston, Harrisburg, etc. Ry. Co. v. *Texas, supra.*
Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 27, and cases there cited.
Looney v. *Crane Co.*, 245 U. S. 178, 189.

These cases definitely establish the rule that the sole test of a statute when examined in the light of the Federal Constitution is its "essential and practical operation", even though the results of such test require nullification of the State courts' construction or the language of the legislature.

In any event, whether these statutes are "independent, separable and severable" is no longer regarded as of any consequence by the Massachusetts Supreme Court. Their combined effect must be controlling in any case.

Liquid Carbonic Co. v. *Commonwealth*, 232 Mass. 19.

(b) The Effect of the 1918 Statute is to Remove the Two Thousand Dollar Limitation of the 1909 Act in the Same Manner as it was Removed by the 1914 Act.

This result necessarily follows from the premise that the two statutes constitute a single system of taxation. One tax is superimposed upon the other. One is "in addition to" (the language of Section 5 of the 1918 Act) the other. This is conclusively shown by the fact that the plaintiff in the instant case was required to pay in the

single year 1918, $4,005.94 under the combined statutes. It is shown also as a matter of judicial construction by the decisions in

International Paper Co. v. *Massachusetts, supra.*
Locomobile Co. of America v. *Massachusetts, supra.*

See also

Lawton Spinning Co. v. *Massachusetts, supra.*

But whether the two statutes constitute a single system of taxation or not, and whether they must be considered separately or not, the "essential and practical effect" is the same so that they are each infected with invalidity under these last named decisions if in the aggregate they impose an unconstitutional burden of taxation on corporations engaged in interstate commerce.

(c) The Combined Effect of the Two Statutes with the Two Thousand Dollar Limitation Removed is to Burden Interstate Commerce.

Had the Act of 1918, Chapter 253 been so drawn as to impose an equal, proportionate and non-discriminatory tax, which, we shall show, was not done, the tax, if it stood alone, might be sustained as a reasonable excise for the privilege of doing a domestic business within the State.

The tax under the Act of 1909 standing alone with the limit of $2,000 has been upheld by this Court as a lawful tax.

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68.

It is the contention of the plaintiff that the two taxes taken together constitute a system of taxation which cannot be sustained as a legitimate excise for the privilege of doing a domestic business and which is unconstitutional as held in the cases of

International Paper Co. v. *Massachusetts*, 246 U. S. 135.

Locomobile Co. of America v. *Massachusetts*, 246 U. S. 146.

Looney v. *Crane Co.*, 245 U. S. 178.

General Railway Signal Co. v. *Virginia*, 246 U. S. 500.

Liquid Carbonic Co. v. *Commonwealth*, 232 Mass. 19.

The statute of 1918, Chapter 253, imposes a per cent tax on the doing of a domestic business and is therefore to be presumed to have been deemed by the Legislature a reasonable tax to be paid for that privilege.

> "Interstate commerce cannot be taxed at all even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State."
>
> *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497.
>
> *Kansas City, etc. Ry. Co.* v. *Stiles*, 242 U. S. 111, 119.
>
> *Galveston etc. Ry. Co.* v. *Texas*, 210 U. S. 217.

Foreign corporations, which, like the plaintiff, had established their business in Massachusetts and were doing a domestic business there had, by reason thereof, become subject to a tax under the law of 1909 up to the amount of $2,000.

The tax imposed under the Act of 1918 in the year 1918, which is the tax in question in the case at bar, was a retroactive tax on past business for the calendar year of 1917 or for the fiscal year for which the corporation had made its last return to the United States revenue department.

The power to tax is the power to destroy by taxation up to 100 per cent, and if the Legislature had the right to

impose this tax at the rate of 1 per cent it could have made it such larger per cent as it saw fit, provided it imposed it without discrimination.

It is evident that a corporation of large capital doing a large interstate business and a small domestic business in Massachusetts and which had become subject to the tax under the Act of 1909 up to a maximum limit of $2,000, might readily, under this system, with an additional retroactive tax imposed up to such rate of taxation as might be fixed in the act, find the returns from its domestic business exhausted by the taxation and in addition be left with a heavy retroactive charge on the revenues of its interstate business.

Even with the rate at one per cent this might readily be true to a substantial extent in the case of a corporation which had become subject to a large tax under the Act of 1909.

It is not necessary for the plaintiff to show that this was the fact in its particular case, for as the plaintiff is within the class of corporations engaged in interstate commerce, unless the tax system imposed is good against all such corporations, it is not good as against it. The taxation system must stand as to all or fall as to all.

Thus if a corporation with a capital sufficient to make it liable to an assessment of $2,000 under the 1909 Act did a small local business in Massachusetts of $40,000, in which it made a five per cent net profit, this profit would have been entirely exhausted by its tax under the 1909 Act and the *ex post facto* tax under the 1918 Act would have to be paid entirely out of its revenues from interstate commerce.

A system of taxation which reaches or burdens interstate business will not be sustained because it is ostensibly levied as a tax for the privilege of doing a local business.

United States Express Co. v. *Minnesota*, 223 U. S. 335, 348.
Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 42.
Fargo v. *Hart*, 193 U. S. 490.
Marconi etc. Co. v. *Commonwealth*, 218 Mass. 558, 567.

The system of taxation put into effect by the combined action of the Acts of 1909 and 1918 is bad also for the following reasons:

With this limitation the Act of 1909 was, in the case of

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68,

by a closely divided court, held to to be valid. The ground of the decision appears to be that the authorized capital stock was not taxed but was a measure adopted by the Legislature, within the limit of a $2,000 maximum taxation, of the value of the privilege of doing a domestic business in Massachusetts. But when the Legislature removed the $2,000 limitation, this Court, in the case of

International Paper Co. v. *Mass.*, 246 U. S. 135,

held that the tax could no longer be considered to be a reasonable measure of the value of the privilege of doing a domestic business in Massachusetts, but must be considered to be a tax on the capital of corporations used both in domestic and interstate business and therefore void.

By the Act of 1918, Chapter 253, the Legislature adopted an exact measure for the privilege of doing a domestic business, namely, the net income derived by the corporation from doing such a business, but left the Act of 1909 unrepealed.

While prior to the passage of the Act of 1918 the excise of 1909 could be regarded not as a tax on the capital of the corporation, wherever and however employed, but a

rough, reasonable gauge, as applied to foreign corporations, of the value of doing a domestic business in Massachusetts, when an exact gauge has been adopted, as in the Act of 1918, and a tax imposed accordingly, the Act of 1909 becomes nothing more than a tax on capital and can no longer be regarded as operating as a reasonable gauge of the value of the privilege.

The fact that there is still the $2,000 limit under the Act of 1909, becomes then of no importance, particularly as there is no such limitation unless the authorized capital stock of the corporation exceeds $10,000,000. As applied to corporations, like the plaintiff in this case, having an authorized capital stock of less than that amount, the tax runs to the entire capital of the corporation regardless of how great a part of that capital may be employed in interstate commerce or where it may be located.

The system of taxation thus put into effect by the operation of the two acts in conjunction constitutes a system of taxation which is invalid under the commerce clause in the same way as the system put into operation by the Act of 1909 and the Act of 1914 was held to be invalid in the case of

International Paper Co. v. *Mass.*, 246 U.S. 135.

It will be urged by the defendant that the Act of 1909 and the Act of 1918 should not both be held to be now invalid, but it is submitted that this is not so inasmuch as the two constitute together one combined system for the taxation of foreign corporations doing a domestic business in Massachusetts and it is impossible to say which of the two acts the Legislature would intend to leave in operation if only one of the acts could stand as the system of taxation. The same principle applies as in the case of the Act of 1909 in conjunction with the Act of 1914, and the argument in favor of upholding one of the acts has

been set at rest in this Court by its denial of the petition for a writ of *certiorari* based on this contention brought by the Commonwealth in the case of

Commonwealth of Massachusetts v. *Liquid Carbonic Co.*, 249 U. S. 603,

after the decision of the Massachusetts Supreme Court in

Liquid Carbonic Co. v. *Commonwealth,* 232 Mass. 19.

(*d*) *The System of Taxation now Assailed in Fact Reaches Revenues from Interstate Business.*

The 1918 Act purports only to reach the income "derived" from local business. It purports specifically to exclude interstate business from the burden of the tax. If, therefore, the act should be construed according to its form, it imposes a second tax for the exercise of the same privilege for which a tax has already been assessed under the 1909 Act. This would be double taxation under a well established rule of law. The construction of a statute to accomplish such result will always, when possible, be avoided. It can only be avoided by the conclusion that when the 1918 Act came into force the 1909 Act under the changed conditions was aimed entirely at interstate commerce, the only other business upon which it could operate. The plaintiff sold "a large part" of its goods in other States than Massachusetts, and such sales required transportation from Massachusetts and delivery in such other States, and sales both within and without the States were made "by use of the same places of business, agencies and instrumentalities" (Rec. pp. 10, 12, 13). Such sales both within and without the State give this plaintiff the protection of the "Commerce Clause" of the Federal Constitution, although the business for which the company was chartered is not in itself interstate commerce.

"True it is that their (its) products are sold and shipped in interstate commerce, and to that extent they are (it is) engaged in the business of carrying on interstate commerce and are (is) entitled to the protection of the Federal Constitution against laws burdening commerce of that character."

Baltic Mining Co. v. *Massachusetts,* 231 U. S. 68, 86.

II.

THE PLAINTIFF BEING ENGAGED IN INTERSTATE COMMERCE IS ENTITLED UNDER THE COMMERCE CLAUSE, AS WELL AS DIRECTLY UNDER THE FOURTEENTH AMENDMENT, TO PROTECTION FROM ANY SYSTEM OF TAXATION WHICH IS WITHOUT DUE PROCESS OF LAW OR WHICH DENIES EQUAL PROTECTION OF THE LAWS.

(*a*) *The Statutes under which the Taxes were Levied in their Combined Effect Taxed Property Beyond the Limits of the State and Therefore Without "Due Process of Law."*

It is true that in the case of

Baltic Mining Co. v. *Massachusetts,* 231 U. S. 68,

where the question under the "due process" clause was a minor point, this Court held that the Act of 1909 was constitutional. But this was a case of a corporation *not* conducting both interstate and local business at the same places and through the same instrumentalities. Moreover, at that time no other statute had been passed imposing any tax in the nature of an excise upon foreign corporations doing business in Massachusetts. In the circumstances of that case, the 1909 statute was held constitutional solely upon the ground that such an excise as then imposed did not tax property outside of the State but that the capital of the corporation was, with the $2,000 limitation, merely used as a rough measure of the value

to the corporation of doing a local business. The court there said:

> "The *property** itself is not taxed",

but when confronted with a situation involving not only the 1909 statute, but also an additional statute imposing a further tax based on capital stock, this Court, in the *International Paper Co.* and the *Locomobile Co.* cases, reached a different conclusion and held that although the statutes ostensibly used capital stock merely as a measure of the value of the privilege of doing a domestic business in Massachusetts, their real and necessary effect was to tax property beyond the limits of the State.

Following its decisions in the cases of

> *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 51;
>
> *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146,

and *Looney* v. *Crane Co.*, 245 U. S. 178, 187,

this Court says in the *International Paper Co.* case:

> "The tax in question should have been declared unconstitutional and void as placing a prohibitive burden on interstate commerce and *laid on property** of a foreign corporation located and used beyond the jurisdiction of the State." (246 U. S. 135, 145.)

Under these decisions a statute imposing on foreign corporations an excise which is based on their capital stock cannot be held to be a legitimate privilege tax but will be held to be a tax on capital assets wherever located unless, as in the Baltic Mining Company case, the conclusion can be drawn in view of all the statutory enactments that the Legislature is using, within proper limitations, the capital stock solely as the gauge of the value of the domestic business privilege.

The Act of 1918, Chapter 253, adopts an exact measure

*Italics are ours.

for determining the value of the doing of a local business in Massachusetts, namely: the net income derived from that business, and taxes that income at the rate which the Legislature deemed reasonable.

With the adoption of this exact measure for so gauging the value of the privilege, the Act of 1909 ceases to operate in any respect as a measure of that value and can only operate solely as a direct tax on the franchise and property of the corporation as represented by its capital wherever located and however employed.

If in its essential and practical operation the 1909 statute in the present circumstances taxes property, the question of whether the $2,000 limitation is or is not removed becomes of no consequence under the "due process" clause because the states have no right to tax property beyond their jurisdiction even to the slightest extent. If the statute taxes property at all beyond the limits of the State, it is void.

International Paper Co. v. *Mass.*, *supra*, at pp. 141, 145.

It is also to be noted that the $2,000 limitation has no effect as to corporations, like the plaintiff, having an authorized capital of less than $10,000,000; as to them all their capital is taxed wherever located and regardless of how much of it is employed in interstate commerce.

(*b*) *The Tax Imposed by the Statute of 1918, Either Alone or in Conjunction with the Act of 1909, is Bad as being Without Due Process of Law, Because it is Arbitrary and Discriminatory both (1) as between Different Foreign Corporations Doing Business Within the State and (2) as between Foreign Corporations on the one hand and Domestic Corporations on the other, and therefore Denies to them the Equal Protection of the Laws.*

(1) The statute is arbitrary and discriminatory as be-

tween different foreign corporations because it *ex post facto* fixes the taxation under the act for different periods and on different incomes as between such corporations according to the arbitrary test of what had previously been taken by the corporation as the period for its return to the United States Internal Revenue Department under the United States Income Tax law.

Section 1 of the Act provides (italics are ours) that

> "Every foreign corporation, as defined in section thirty-nine of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine, shall pay a tax to the commonwealth computed upon the net income for *its fiscal* or *calendar year* next preceding, as hereinafter provided, *upon which income such corporation is required to pay a tax to the United States.* Each corporation subject to the tax imposed by this act shall render to the tax commissioner, under oath or affirmation of its treasurer or assistant treasurer, on or before the first day of July in the year nineteen hundred and eighteen, *unless the fiscal year of the corporation for which it made return to the collector of internal revenue* ended between the thirtieth day of April and the first day of July, both inclusive, in which case the said report shall be rendered by the corporation within sixty days after the date of the closing of *its said fiscal year, a true copy of the last return made to the collector of internal revenue, of the annual net income* arising or accruing from all sources in *its fiscal* or *calendar year* next preceding, stating the name and situation of the principal place of business of the corporation; the kind of business transacted, and a list of all subsidiary companies, if any, with the situation of the principal place of business of each; the gross amount of its income *during*

the said year from all sources, and the amount of its ordinary necessary expenses paid out of earnings in the maintenance and operation of the business and properties of the corporation; *such other information as may be requested by the United States treasury department for the purpose of ascertaining the total amount of net income taxable under the United States income tax act;* the net income of the corporation after making the deductions authorized; the amount of taxes paid upon its income *to the internal revenue department* for the year next preceding the *one for which such return is made.*"

While this section is crudely worded, it is clear that the income which it attempts to tax is (a) either the income for the preceding calendar year or (b) the income for the corporation's preceding fiscal year, according to whether the particular corporation had previously happened to make its return to the United States tax authorities for a fiscal or calendar year. This is made additionally clear by Section 2 which permits deductions from or additions to the income assessed according as such deductions are allowed or additions required by the United States authorities on the income assessed on the Federal return.

It may be true that a tax law is not bad merely because it allows corporations to choose whether they will take the income of the next preceding calendar or the next preceding fiscal year as the basis for their returns and taxation, although this may be doubted where, as in this case, the tax law is expressly limited to a single year's duration (see Section 6 of the Act). But where no choice is given and one corporation is taxed for the income of its preceding fiscal and another for the income of the preceding calendar year according to the arbitrary test of what period it has previously, before the tax law was passed, been chosen

as the year for which it would make a return to another taxing authority, such taxation is not by due process of law because it is purely arbitrary and discriminatory and denies to the parties taxed equal protection under the law. Illustrating this in figures:

Foreign corporations A and B are located in Massachusetts and engaged in the same kind of business, including both domestic and interstate. Each has made $250,000 net profits from Massachusetts domestic business during the calendar year 1917, but on account of special circumstances, as for instance a general transportation strike resulting in the cutting off of incoming goods, and high prices for goods on hand, $200,000 of these profits have been made in December. Corporation A has previously adopted for its United States returns the fiscal year system and as its fiscal year ended December 1 these returns do not include the December business and therefore show a net income of only $50,000 from domestic Massachusetts business. Corporation B, doing exactly the same business with the same results, has adopted the calendar year system in its United States returns and therefore shows $250,000 profits from domestic Massachusetts business. Corporation A, under the Massachusetts act, would be taxed $5,000, while corporation B would be taxed $25,000.

It is also to be noted that the choice of these two corporations as between fiscal and calendar year returns would have been governed by entirely different considerations in the case of the United States returns from what they would be in returns under the State law with any open choice under that law. Under the United States law each corporation was in the beginning given an open choice under the law whether it would use its fiscal or the calendar year as the basis for its returns; no limitation was placed on the continuance of the law and it could determine for itself whether, in view of results in future years, it would in the

end be likely to come out better by taking one or the other period. But the State law of 1918 not only gives no such choice, but by its terms runs only for one year and therefore affords no possibility of recoupment by a lesser tax on the next year's returns. It arbitrarily mulcts one corporation for one sum for a certain income period and another corporation similarly situated for a much larger tax solely because before the Act of 1918 was enacted it had taken a different period for its United States returns.

The grounds of choice between fiscal and calendar years would also be different in the case of the same corporation under the United States law and the State law, for the subject matter of the taxation is different. Thus the entire net profits of a corporation, which are the subject matter of taxation under the United States law, might be identical for the fiscal year and the calendar year, while this might not be at all the case as to domestic profits. The fiscal year might show large domestic profits while the calendar year might show none or losses, and vice versa. The choice as between fiscal and calendar year would then have been immaterial from the point of view of the United States returns, but under the State law passed subsequently the immaterial choice which the corporation has made as to the period for its United States returns is what may determine whether the corporation shall pay no tax or an indefinitely large one based on profits which in fact have been wiped out by losses occurring between the termination of the one period and the termination of the other.

The United States, except in its constitutional restrictive powers, has no more relation to the taxing power or tax laws of the State than a foreign country, and the period of time selected in tax returns to the United States can no more legitimately be taken as the factor to fix taxes

to be paid to the State than a period taken in returns to the king of Timbuctoo.

The provisions of Section 2 as to deductions or additions are equally arbitrary and unconstitutional. Under that section if the United States internal revenue commissioner or any other official of the United States makes any change or correction in the net income returned to him, the corporation is required to pay an additional tax if such change is an addition, and if it is a deduction the treasurer is required to pay back to the corporation the deduction, with no right under the statute to collect it again. This is all regardless of whether the action either way of the Collector or the United States official is subsequently upheld on any judicial review.

It is to be noted also that if one corporation is fortunate enough to get such a reduction and then there is a change of officials and the new officer takes a different view as to an identical claim by another corporation, the first corporation gets the refund from the State Treasurer and the second corporation does not, irrespective of the correctness or error of the respective views of the two United States officers.

(2) There are equally fatal discriminations as between domestic and foreign corporations.

In the case of

> *H. P. Hood & Sons* v. *Commonwealth*, 235 Mass. 526, at p. 576,

the Supreme Court of Massachusetts says:

> "The present tax [assessed under Acts 1918, c. 253] is not discriminatory against foreign corporations. An additional tax on domestic corporations quite as onerous in its terms was imposed by St. 1918, c. 255, taking effect on the same day as the statute here in question."

It does not appear from this brief comment whether in the *Hood* case the attention of the Massachusetts Court was called to the discrimination to which attention will now be directed. But however this may be, it remains solely for this Court to determine whether there is an unconstitutional discrimination.

Chapter 253 and Chapter 255 of the Acts of 1918 were passed at the same time and with certain provisions of Chapter 255 expressly incorporated in Chapter 253. They were passed as a system of taxation ostensibly imposing the same rate of income taxation on foreign and domestic corporations. An examination of the two acts shows, however, that there is in the system so adopted a discrimination between foreign and domestic corporations based on their out of the State business. For this reason the system of taxation thus adopted is unconstitutional under the commerce clause and is without due process of law.

In view of the decision of this Court in a number of cases, including

> *Cheney Bros.* v. *Massachusetts*, 246 U. S. 147, where, at page 157, the court says:
>
> "A state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them",

it cannot be claimed that the State may not impose a different rate of taxation on foreign and domestic corporations.

But it is the contention of the plaintiff that the State cannot, without violating the commerce clause and the Fourteenth Amendment, take as a basis for such discrimination the business which the two kinds of corporations

conduct outside of the State, all of which may be interstate commerce.

This the State has done in the Acts of 1918, Chapters 253 and 255, for it has made the business done out of the State the express basis for entirely different and discriminatory deduction provisions under the two statutes.

Under Chapter 255 relating to domestic corporations the basis of taxation is identical with that of a foreign corporation under Chapter 253 if both are engaged solely in domestic business in Massachusetts, but if the two are engaged in business out of the State, all of which may be interstate commerce, a different and discriminatory system is provided as to income to be taxed.

Under Section 3 of Chapter 255 a domestic corporation doing business out of the State and deriving profits principally from the sale or use of tangible personal property is taxed only on such portion of its net total income as the fair cash value of its real estate and tangible personal property in Massachusetts on the date of the close of its fiscal year bears to the fair cash value of the entire real estate and tangible personal property then owned by it. This class of corporations includes most manufacturing and trading corporations. Such a corporation, particularly if it owned no real estate in Massachusetts, could under this provision substantially escape any Massachusetts taxation if it either (1) carried in Massachusetts a small stock of merchandise with quick turnovers, or (2) saw to it that its stock of Massachusetts merchandise on this one day was reduced to a minimum.

This is a well known and common practice when taxation is based on personal property held at a particular place on a particular day and one which would be particularly available for a corporation doing business in another state, as, if it did not wish actually to reduce its stock, it would accomplish the same thing by holding it out of the

state for that particular day, and by the taxation exemption thus secured be put at an advantage over a foreign corporation doing the same out of the state business under identical conditions. If it were not that the benefit of these provisions is given only to Massachusetts domestic corporations engaged in business in other states, this discrimination, though unconscionable, might be outside the protection afforded by the Constitution of the United States; but when, as in this case, the exemptions turn on whether or not the domestic corporation is or is not engaged in out of the state business and is given to domestic corporations so engaged but denied to foreign corporations similarly engaged, it becomes a discrimination based on out of the state commerce and therefore within the protection of the Constitution. It is in fact difficult to see why this method of assessing is applied to Massachusetts corporations carrying on business in another state and not to other Massachusetts corporations which may carry large stocks of goods in storage out of the state, unless its purpose is to give this advantage to Massachusetts corporations in their out of the state competition with foreign corporations which locate in Massachusetts.

If under the guise of its right of local taxation a state can thus pick out its domestic corporations engaged in out of the state business for special exemptions from taxation not given to foreign corporations similarly engaged, and can do this by a tax act operating retroactively, it affords a ready means for a state to nullify the commerce clause of the United States Constitution. With a sufficiently high rate of tax a foreign corporation which was so unfortunate as to be carrying on a local business in Massachusetts and which was also engaged in interstate commerce in and from other states could be very seriously handicapped and embarrassed as against competing Massachusetts corporations engaged in a similar inter-

state business. With the act retroactive there is no escape for the foreign corporation from this discriminatory taxation, however ruinous it might be to it, if such taxation is upheld.

As stated by this Court in

> *Looney* v. *Crane Co.*, 245 U. S. 178, at p. 189, and *International Paper Co.* v. *Mass.*, 246 U. S. 135, at p. 144:
>
> "In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698, that 'The substance and not the shadow determines the validity of the exercise of the power'."

Applying this consideration it is submitted that the tax power of the State is not validly exercised in the Acts of 1918, Chapters 253 and 255.

When a state by tax laws operating retroactively picks out domestic corporations and grants them exemptions from taxation imposed *ex post facto* because they are engaged in out of the state business, all of which may be interstate commerce, while denying these exemptions to foreign corporations similarly situated, the enactments are bad under the commerce and due process clauses of the Federal Constitution.

Southern Ry. Co v. *Greene*, 216 U. S. 400.

SUMMARY OF CONSTITUTIONAL POINTS.

1. The Act of 1918, Chapter 253, is superimposed upon the Act of 1909 which, standing alone, has, with the similar act under consideration in *General Railway Signal Co. v. Virginia,* 246 U. S. 500, been sustained by this Court as barely within the constitutional limitations.

2. The Act of 1918, superimposed upon the Act of 1909, as a further privilege excise, is

(a) Retroactive;

(b) Removes the $2,000 limitation of the Act of 1909;

(c) As applied to corporations, like the plaintiff, already located in Massachusetts under the Act of 1909, increases retroactively by a large amount the excise to be paid by them without option on their part as to taking the privilege on the new terms;

(d) Purports to adopt an exact measure of the value of the privilege, namely: net income of Massachusetts business, and taxes on that basis, but leaves the Act of 1909 still in force and operating no longer as a measure of the value of the privilege but as an arbitrary capital stock tax:

(e) Discriminates arbitrarily between foreign corporations as to the income period which shall be taken for taxation and also as to refunds or additions which shall be made; and

(f) In the general income tax system put into effect by Chapter 255, in conjunction with Chapter 253, incorporates discriminatory provisions in favor of domestic corporations engaged in out of the state business as against foreign corporations similarly engaged.

3. The Acts of 1918, Chapter 253 and Chapter 255, if looked at from the point of view of property taxes, discriminate, in the manner which has been pointed out, arbitrarily between different foreign corporations and also

between foreign corporations and domestic corporations when engaged in out of the state business.

The taxation system thus put into effect by the Acts of 1909 and 1918 imposes an unconstitutional burden on the plaintiff as a foreign corporation engaged in interstate commerce.

III.

THE UNCONSTITUTIONALITY OF THE TAXES HAVING BEEN ESTABLISHED, THERE IS NO VALID BAR TO RECOVERY FROM THE DEFENDANT.

(a) A Protest at the Time when the Taxes were Paid was Not a Necessary Condition Precedent to the Right of Recovery.

It is sufficient if the payment was involuntary to such an extent that it may fairly be said that the tax payer was acting under *duress* or *compulsion of law.*

> "Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it *by compulsion of law, or* under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."
>
> *City of Philadelphia* v. *The Collector*, 5 Wall. 720, 731, 732.

The controlling consideration is whether the payment was made under *duress or compulsion of law.* The Massachusetts statutes under which these taxes were levied and paid contain these provisions :

1. "No certificate (*i. e.*, of condition) shall be filed until he (*i. e.*, the Tax Commissioner) has endorsed his approval thereon and until the excise tax required by the following section (*i. e.*, Section 56) has been paid to the Treasurer and Receiver General."

Acts 1909, Chapter 490, Part III, Section 55.

2. "If such business or foreign corporation fails to file such return or certificate within thirty days after such notice of default has been given or mailed, it shall forfeit to the Commonwealth not less than five nor more than ten dollars for each day for fifteen days after the expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter", etc. (Section 58.)

3. Among other things: "the court may issue an injunction restraining the further prosecution of the business" until the statutes are complied with. (Section 58.)

4. For failure to pay the tax the Corporation "shall pay interest at the rate of six per cent per annum" if payment is made before commencement of proceedings, and "twelve per cent if made after the commencement thereof". (Section 60.)

5. And "the Court may issue an injunction upon such information, restraining the further prosecution of the business of such company or corporation until such penalties or taxes, with interest and costs thereon, have been paid". (Section 62.)

6. Collection of the tax may also be made by warrant directed to the sheriff. (Section 69.)

These collection powers are incorporated in the Acts of 1918, Chapter 253.

Acts of 1918, Chapter 253, Section 4.

Acts of 1918, Chapter 255, Sections 4–9.

Clearly these provisions leave a foreign corporation no alternative but to pay the tax or to suffer severe penalties, including restraint from the further prosecution of its business in the Commonwealth. The filing of the return and the payment of the tax are coupled together: both acts must be performed or all the penalties impend. Payment of the tax under these certain penalties is obviously payment under "compulsion and duress". It was such provisions as these which this Court had in mind in the case of

> *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 471, 472,

where it is said by Mr. Justice Lamar:

> "An act which declares that where the franchise tax is not paid by a given date a penalty of twenty-five per cent shall be incurred, the license of the Company shall be cancelled and the right to sue shall be lost, operates much more as duress, than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back. *Swift Co.* v. *U. S.*, 111 U. S. 22, 29; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329; *Atchison, Topeka & Santa Fe R. R.* v. *O'Connor*", 223 U. S. 280. *Cf. Union Pacific R. R.* v. *Public Service Commission*, 248 U. S. 67, 70.

See also

> *International Paper Co.* v. *Burrill*, 260 Fed. 664, 665.
> *Ward* v. *County Commissioners*, 253 U. S. 17, 23.

It is significant that the statutes under which these taxes were levied and collected make no provisions whatever for protest. It is sufficient under these statutes if the tax payer is "aggrieved" by the imposition and collection of the tax. No sound reason can be suggested why the tax

payer should be at a greater disadvantage at common law than under the statutes.

That such penalties and forfeitures constitute compulsion and duress, and so obviate the necessity of protest, is likewise clearly settled by the Massachusetts decisions.

Marconi Wireless Telegraph Co. v. *Commonwealth*, 218 Mass. 558, 562, 568.
Boston & Sandwich Glass Co. v. *Boston*, 4 Met. 181.
Lincoln v. *Worcester*, 8 Cush. 55, 61.
Boott Cotton Mills v. *Lowell*, 159 Mass. 383, 386.
Amesbury Woolen Co. v. *Amesbury*, 17 Mass. 461.
Dow v. *First Parish*, 5 Met. 73.
Preston v. *Boston*, 12 Pick. 7.
Boston Water Power Co. v. *Boston*, 9 Met. 199.
Rosenfeld v. *Boston Mutual Life Insurance Company*, 222 Mass. 284, 289.
Shaw v. *Becket*, 7 Cush. 442, 445.
Cunningham v. *Monroe*, 15 Gray, 471.

It was said by Mr. Justice Rugg in the *Marconi* case, *supra*, after commenting on the similarity of the facts in that case to those in *Atchison, Topeka & Santa Fe R. R.* v. *O'Connor*, 223 U. S. 280, with respect to the severity of the penalties:

> "Somewhat summary remedies are given in the event of a failure to pay the tax. See Stat. 1909, Ch. 490, Part III, Sections 58, 62, 69. . . ."
>
> "The petition under this statute 'does not require any preliminary protest or statement of objection before filing the petition.'"

In *Boston & Sandwich Glass Co.* v. *Boston*, *supra*, at pages 182, 183:

> "The taxes for the years preceding 1839 were paid by the plaintiffs' without making any objection at the

> time, — the plaintiffs and the defendants supposing them to be rightly assessed."

Nevertheless the plaintiff recovered judgment for all the taxes involved in that suit not barred by the statute of limitations, including the taxes for five years when the payments were made without protest. The only importance attached to the protest in that case was that it fixed the time from which the plaintiff might recover interest; such time being determined in the cases of no protest by the date of demand for payment, or the date of the writ.

The conclusion from the foregoing cases is clear that when the tax is paid under compulsion of law or duress, a protest at the time of payment is not necessary. It is equally clear that the severe penalties and forfeitures provided by the Massachusetts statutes under which these taxes were assessed and collected constitute duress and so absolved the plaintiff from the necessity of making a protest before bringing its action.

Cases like

> *Elliott* v. *Swartwout*, 10 Peters, 137,

have no application to the facts in this case, consisting, as they do, of customs and internal revenue cases which involve no payments made under compulsion or duress. These cases establish a special rule limited to that class of cases in substance that

> " Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them."
>
> *Erskine* v. *Van Arsdale*, 15 Wall. 75, 77.

Indeed in the instant case the defendant had sufficient grounds, while the funds were still under his control, for

understanding that the taxes were regarded as illegal by reason of the petition in the State court to recover these taxes (Rec. p. 10).

(b) *The Payments Having Therefore been Made Under Compulsion of Law or Duress, they may be Recovered back from this Defendant Personally in an Action for Money had and Received.*

This is so because the payment is made under compulsion and duress, and because the collector acts not within but without the law.

In the recent case of

Ward v. *County Commissioners*, 253 U. S. 17, 24,

this Court said:

> "As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the County to refund the money. It is a well settled rule that 'money got through imposition' may be recovered back; and as this Court has said on several occasions, 'the obligation to do justice rests upon all persons, *natural* and artificial, and if a County obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation'."

And when this principle has been applied to an individual this Court says:

> "If he had no right, as he had not, to collect the money, his doing so in the name of the State cannot protect him."

Atchison, Topeka & Santa Fe Ry. v. *O'Connor*, 223 U. S. 280, 287.

Erskine v. *Van Arsdale*, 15 Wall. 75.

International Paper Co. v. *Burrill*, 260 Fed. 664, 665.

And see

Swift & Co. v. *U. S.*, 111 U. S. 22, 29,
Agassiz v. *Trefry*, 260 Fed. 226, 227,

and cases there cited.

Also *Ex parte Young*, 209 U. S. 123.
Hopkins v. *Clemson College*, 221 U. S. 636, 642, 644.
Western Union Telegraph Company v. *Andrews*, 216 U. S. 165, 166.
Looney v. *Crane Co.*, 245 U. S. 178, 191.
Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S. 278, 293.
Ludwig v. *Western Union Telegraph Co.*, 216 U. S. 146.
Herndon v. *Chicago, R. I. & P. Ry.*, 218 U. S. 135, 155.
Poindexter v. *Greenhow*, 114 U. S. 270.
Truax v. *Raich*, 239 U. S. 33, 37.
Philadelphia Co. v. *Stimpson*, 223 U. S. 605, 607, 620.
Johnson v. *Lankford*, 245 U. S. 541.
Greene v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499.
Nevada-California Power Co. v. *Hamilton*, 235 Fed. 317.
Pennoyer v. *McConnaughy*, 140 U. S. 1.

In the *Hopkins case, supra*, Mr. Justice Lamar says:

"But immunity from suit is a high attribute of sovereignty — a prerogative of the State itself — which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. . . .

"The many claims of immunity from suit have therefore been uniformly denied, where the action

was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they — though not exempt from suit — could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446, 452. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute. Besides, neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application — the wrong doer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury. . . .

"But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit."

The same principles were laid down in the *Nevada-California Power Co.* case, *supra*, where the Court said at page 322:

"When a State or County officer has committed or has threatened to commit an illegal or unconstitutional act under color of authority from the State, he is shielded by none of the State's immunity from suit; he becomes himself an actor; he incurs the liability of, and may be proceeded against as, the principal *tort-feasor*."

In collecting these taxes, under the circumstances of this case, the defendant himself was wrongfully under an unconstitutional statute which can afford him no protection, compelling payment by the plaintiff under the duress of severe penalties imposed by the Massachusetts statutes under which he was claiming to act.

The rule that a State may not be sued without its consent does not protect him, because the State is not here the defendant.

> *Sage* v. *United States*, 250 U.S. 33 at p. 37.

And the defendant can produce no valid statute whereby he may justify his action.

That the Massachusetts rule is not different from that of the Federal cases where the taxes are paid under compulsion and duress is clear from the Massachusetts decisions above cited at page 39, including

> *Marconi Wireless Telegraph Co.* v. *Commonwealth*, 218 Mass. 558, 562, *supra*, and
> *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181, 189.

The ultimate foundation of the defendant's personal liability in an action for money had and received is that he has personally made an unlawful exaction from the defendant which he is bound in equity and good conscience to repay. It depends in no sense upon his willingness to repay, nor upon the fact that he is or is not notified at the time of payment that the tax payer objects to the payment, nor upon the fact that he may no longer have the collected funds in his possession. It appears in the agreed facts that the defendant deposited the payment in an account which could be drawn upon by checks signed by him, and it does not appear that he had ceased to have such power when this suit was brought (Rec. p. 9).

The obligation to repay arises *in invitum*.

> "It is an entire mistake of the true meaning of the rule of the common law, which is sometimes suggested in argument, that the action of *assumpsit* for money had and received, is founded upon a voluntary, express, or implied promise of the defendant, or that it requires privity between the parties *ex contractu* to support it.
>
> "The rule of the common law has a much broader and deeper foundation. Wherever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right to exact or retain from him, there it forces the promise upon him *in invitum* to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor."
>
> *Cary* v. *Curtis*, 3 How. 236, 255.

The absence of a notice to the defendant does not weaken these principles in their application to this case. It is submitted that the cases like

Elliott v. *Swartwout*, 10 Peters, 137,

are not at variance with this statement. It was a fact in that case that the payment in question was voluntary — that is, not made under duress or compulsion, and it was clearly recognized by the court in that case in discussing the cases previously decided involving the questions of notice and voluntary payment, that the presence or absence of duress or compulsion was an element of supreme importance in determining whether or not the defendant was personally liable. The court expressly approves the distinction, for it decided that a voluntary payment could not be recovered, but

"that the cases which exempt an agent when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion, or extorted as a condition."

Elliott v. *Swartwout, supra,* at page 158, and cases cited.

See also

Ward v. *County Commissioners,* 253 U. S. 17, at p. 24.
Ogden v. *Maxwell,* 3 Blatch. 319.
Swift & Co. v. *United States,* 111 U. S. 22, 29.

In short, the absence of notice to the agent not to pay over the money has been uniformly held not to constitute a defence in cases of compulsion or duress, although he has paid it over to the principal.

In the lower court the defendant placed much reliance upon the case of

Cary v. *Curtis,* 3 How. 236,

for the proposition that

"It requires the ruling that the common law of Massachusetts has been so modified by statute (that of 1909, giving a remedy against the Commonwealth by equity petition) as to abolish the cause of action which the plaintiffs in these cases are seeking to enforce."

But that decision contained nothing whatsoever bearing upon the defendant's claim that a new equity remedy granted to sue the State completely abolishes the substantive right at common law to sue the collector of the taxes in cases of duress for payments which have been made under an unconstitutional statute where he was, as in this case, warned against paying over the same by the petition which was brought in the State court (Rec. p. 10), the service of such petition being on the treasurer and receiver

general (Acts 1909, C. 490, Pt. III, Sec. 70), who was the present defendant. It merely decided that a constitutional statute of the United States which required the collector to pay over the collected funds to his principal prevented him from being sued, although prior to the statute he was personally liable under the general principles of agency where he had received notice not to pay over to his principal. He had no option to return or repay the legal taxes. Consequently in that case a promise to repay the plaintiff could not be implied in the face of a lawful statute creating the obligation and implied promise to pay the tax over to the United States. The decision in that case would necessarily have been the reverse if, as in the instant case, the statute requiring payment had been unconstitutional.

See

Hopkins v. *Clemson College*, 221 U. S. 636, 644.

In the instant case an unconstitutional statute required the tax to be paid " to the Treasurer and Receiver General for the use of the Commonwealth ".

Acts of 1909, Part III, Chapter 490, Section 56.

This requirement was a nullity. The trust for the benefit of the Commonwealth could not have been enforced; therefore he might have returned the money. Whether he had deposited it in his own bank account or in that of the Commonwealth, it still belonged to the real owner. It formed no part of the assets of the State. It might at the time have been withdrawn by him upon his own check and repaid to the real owner without any warrant of the Governor and Council, even if such warrant was required in case of funds really belonging to the State. He received the money in trust. The trust for the State was void. He therefore held it in trust for the real owner. He had no business to pay it over to his principal. He committed

a wrongful act in collecting the tax and also in paying it over to his principal.

See

Atchison, etc., Ry. Co. v. *O'Connor,* 223 U.S. 280, at p. 287.

The defendant is presumed to know the law; he therefore knew that all his actions were unlawful. He had received, through the filing of the State court petition served on him to recover the payments, specific notice of the plaintiff's claim that the payments had been wrongfully extorted from it (Rec. p. 10).

(c) *The Statutes of Massachusetts Do Not Provide an Exclusive Remedy for the Recovery of these Taxes.*

The 1909 and 1918 acts both provide remedies against *the State* to recover taxes paid under those acts in a suit brought in the State court, and it is said that these remedies are exclusive — in other words, that the State is unwilling that it shall be sued in any other jurisdiction than in its own courts. But *remedies* against *the State* are the only remedies which the statutes in question purport to deal with.

As stated by this Court in

United States v. *Emery etc. Co.*, 237 U. S. 28, at p. 31:

"The right to sue the Collector for an unjustified collection was given by the common law."

Such a suit is not a suit against the State and provisions as to suit against the State have no bearing on such a suit against the collector of the taxes. As stated by this Court in

Sage v. *United States*, 250 U. S. 33, at p. 37:

"But no one could contend that technically a judgment of a District Court in a suit against a collector

> was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different."

There is nothing in the statutes which can even remotely be construed into an attempt by the Legislature to abolish or limit the *substantive* rights of any citizen against individuals. If the statutes do not mention substantive rights at all, if they had provided that thereafter taxes paid under duress should not be recoverable or that a written protest should be filed in all cases, or that suits should not be maintainable against private individuals for their wrongful acts, in connection with the collection of taxes or for the unlawful collection thereof, or that suits should not be maintainable against officers to enjoin the collection of unlawful taxes, or that an official should be protected from suit if he had paid over his collections to the State, although the payments were made under duress, some justification might be afforded for the contention that these statutes were intended to abolish all common law and equitable substantive rights arising out of the enforcement of these statutes. But the statutes mention none of these matters. They purport to affect none of them. Rights against individuals or corporations are not mentioned or even referred to. Even though they had been, it is submitted that the Commonwealth of Massachusetts has not the constitutional power to abolish the substantive rights of a citizen of another State, such as the plaintiff in this case is, to recover against a party collecting a tax under an unconstitutional statute. Moreover if the statutes under which the taxes were levied are unconstitu-

tional, the remedy provided by the statutes must fall with the statutes themselves, and if the contention that they provide an exclusive remedy were sound, the inevitable result would be that a citizen of another State who had paid taxes under such unconstitutional statutes would be wholly without a remedy.

> " A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts."
>
> *Smyth* v. *Ames*, 169 U. S. 466, 517.
>
> *Union Pacific Ry.* v. *County Commissioner*, 247 U.S. 282.
>
> *Nevada-California Power Co.* v. *Hamilton*, 235 Fed. 317, 339.
>
> *International Paper Co.* v. *Burrill*, 260 Fed. 664, 669.

This case is wholly different from *Cary* v. *Curtis*, *supra*, because, by reason of the constitutional statutory obligation to pay the taxes over to the Treasurer, in that case no promise could be implied by law to repay the taxes to the tax payer. But if, as we have above shown, the statutes containing the remedies against the State are unconstitutional, the obligation to pay to the State fails, thus leaving the way open to the implication of a promise to repay to the tax payer. In any event, we submit that the pronouncement of this Court in

> *Smyth* v. *Ames*, 169 U. S. 466, 517,

and the other cases cited, completely disposes of the defendant's contention in this particular.

See also

> *Cunningham* v. *Macon, etc., R. R. Co.*, 109 U. S. 446, 452.
>
> *Harrington* v. *Glidden*, 179 Mass. 486, 492.

CONCLUSION.

In conclusion, since these taxes were levied and paid under an unconstitutional system of taxation, they may be recovered back in this action, despite the fact that a protest was not filed when they were paid; because they were paid under duress and compulsion of law at a time when no statute of Massachusetts required a protest at the time of such payment; and because the defendant knew the plaintiff claimed the exactions were unconstitutional when the funds were still under his control. The defendant is personally liable because of such duress or compulsion of law, and because he can produce no valid statute to justify his action in making the collections. Moreover, he is not protected by the State's immunity from suit, because this is not a suit against the State. His obligation to repay arises *in invitum* out of the unlawful exactions, and because the plaintiff's right to recover from him depends not on any statute, but on the common law; and although the State statutes purport to provide an exclusive remedy, the remedy so provided applies only to suits against the State. As against individual wrong doers, the State has purpurted to cut off no rights or remedies, and it could not, if it would, cut off the right of a foreign corporation, like this plaintiff, from redress in the courts of the United States.

Respectfully submitted,

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Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1921

No. 113

JOHN L. WHITING—J. J. ADAMS COMPANY
PLAINTIFF IN ERROR

v.

CHARLES L. BURRILL

In Error to the District Court of the United States for the District of Massachusetts

BRIEF FOR DEFENDANT IN ERROR

WM. HAROLD HITCHCOCK
Attorney for Defendant in Error

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Attorney for Defendant in Error

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Supreme Court of the United States

October Term, 1921.

No. 113.

JOHN L. WHITING — J. J. ADAMS COMPANY,
PLAINTIFF IN ERROR,

v.

CHARLES L. BURRILL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This is a writ of error seeking to reverse a judgment for the defendant entered by the United States District Court for the District of Massachusetts in an action of contract brought to recover taxes to the amount of $4,005.94 assessed upon the plaintiff in error by the Commonwealth of Massachusetts and paid by the plaintiff in error to the Commonwealth, while the defendant in error was in office as Treasurer and Receiver-General, the claim being that these taxes were assessed in violation of the Federal Constitution. The plaintiff in error will be herein referred to as the plaintiff and the defendant in error as the defendant.

The plaintiff is a corporation organized under the laws of some state other than Massachusetts. It manufactures its goods in Massachusetts and not elsewhere, but sells the same from its place of business in Massachusetts for delivery both in that state and in other states, thus transacting both an interstate and a domestic business. (Rec., p. 9.) It appears to have no place of business outside of Massachusetts, although it owns real estate to the value of $60,000 in the State of New York from which it receives income in the form of rent. (Rec., p. 10.)

On July 27, 1918, the plaintiff filed with the Tax Commissioner of the Commonwealth a return of its income as required by Massachusetts Statutes of 1918, chapter 253 (Rec., pp. 10, 13), and subsequently on September 3, 1918, wrote to the Tax Commissioner a letter of explanation of that return. (Rec., p. 16.) Thereupon a tax under this statute in the sum of $4,591.17 was assessed upon it by the Tax Commissioner. (Rec., p. 9.)

On October 3, 1918, the plaintiff submitted to the Tax Commissioner its certificate of condition as required by Mass. St. 1909, c. 490, Pt. III, sec. 54. This certificate was thereupon approved by the Tax Commissioner and a tax assessed under section 56 of the last mentioned statute in the sum of $480, this amount being one-fiftieth of one per cent of its authorized capital stock. (Rec., pp. 8, 9.)

The total amount of these two taxes was on October 7, 1918, paid by the plaintiff. This payment was made by means of a check payable "To the Order of the Collector of Taxes of the Commonwealth". The check was endorsed by use of a rubber stamp, "Com-

monwealth of Massachusetts, by Chas. L. Burrill, Treasurer and Receiver-General", and was thereupon deposited in a bank account standing in the name of the Commonwealth together with other general revenue. The defendant took no personal part in the receipt of this payment, all acts in connection therewith being performed by the paying teller, an employee of the Commonwealth in the office of the Treasurer and Receiver-General. The plaintiff made no protest of any sort in connection with this payment and in no way otherwise indicated any claim upon its part as to the invalidity of these taxes. (Rec., p. 9.)

Subsequently it was held by the Supreme Judicial Court, in American Printing Co. *v.* Commonwealth, 231 Mass. 237, that, in the assessment of income taxes under St. 1918, c. 255 upon domestic corporations, excess profit taxes paid the Federal Government should be deducted in determining the taxable income. This had not been done in the assessment of the tax paid by the plaintiff under chapter 253. As the language of the two statutes were in this respect the same, the Commonwealth refunded to the plaintiff the sum of $1,065.23, being the amount of the over-assessment which thus resulted. (Rec., p. 10.) The net tax paid by the plaintiff under St. 1918, c. 253, thus amounted to $3,525.94.

Upon the foregoing facts the District Court refused to rule, as requested by the plaintiff, that these taxes were unconstitutional and invalid, but ruled that they were levied and paid under valid tax laws and found for the defendant. (Rec., p. 19.) A direct writ of error was thereupon taken to this court.

STATUTES.

Mass. St. 1909, c. 490, Part III.

Section 56. *Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay* to the treasurer and receiver-general, for the use of the commonwealth, *an excise tax* to be assessed by the tax commissioner *of one fiftieth of one per cent of the par value of its authorized capital stock* as stated in its annual certificate of condition; *but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars.*

Mass. St. 1914, c. 724, §§ 1 and 2.

"Section 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition.

Section 2. All laws now or hereafter in force relating to the assessment and collection of the tax imposed by said section fifty-six and all laws providing for appeal from any assessment made under said section fifty-six or for the recovery of any tax assessed thereunder shall, except so far as they are inconsistent with the provisions of this act, apply to the tax imposed by this act."

Mass. Gen. St. 1918, c. 76.

"Section 1. Chapter seven hundred and twenty-four of the acts of nineteen hundred and fourteen is hereby repealed.

Section 2. This act shall take effect upon its passage. [*Approved March 18, 1918.*"

Mass. Gen. St. 1918, c. 253.

An Act imposing an Additional Tax upon the Net Incomes of Foreign Corporations.

Be it enacted, etc., as follows:

Section 1. Every foreign corporation, as defined in section thirty-nine of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine, shall pay a tax to the commonwealth computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States. Each corporation subject to the tax imposed by this act shall render to the tax commissioner, under oath or affirmation of its treasurer or assistant treasurer, on or before the first day of July in the year nineteen hundred and eighteen, unless the fiscal year of the corporation for which it made return to the collector of internal revenue ended between the thirtieth day of April and the first day of July, both inclusive, in which case the said report shall be rendered by the corporation within sixty days after the date of the closing of its said fiscal year, a true copy of the last return made to the collector of internal revenue, of the annual net income arising or accruing from all sources in its fiscal or calendar year next preceding, stating the name and situation of the principal place of business of the corporation; the kind of business transacted, and a list of all subsidiary companies, if any, with the situation of the principal place of business of each; the gross amount of its income during the said year from all sources, and the amount of its ordinary necessary expenses paid out of earnings in the maintenance and operation of the business and properties of the corporation; such other information as may be requested by the United States treasury department for the purpose of ascertaining the total amount of net income taxable under the United States income tax act; the net income of the corporation after making the deductions authorized; the amount of

taxes paid upon its income to the internal revenue department for the year next preceding the one for which such return is made.

SECTION 2. If the amount of the net income returned by any such corporation to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by any other official of the United States, such corporation, within ten days after the receipt of notification of the change or correction, shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. In case a corporation fails to file the return within the time prescribed, there shall be added to, and become a part of the tax, as an additional tax, the sum of five dollars for every day during which the corporation is in default. If any deduction is made from the net income as returned, the tax commissioner shall certify to the auditor the amount of any tax paid upon such deduction, and the treasurer and receiver general shall pay said amount without any appropriation therefor, or if any addition is made, the corporation shall, within thirty days after receipt of notice from the tax commissioner of the amount of such addition, pay the tax thereon.

SECTION 3. If any such corporation carries on business outside of this commonwealth, or owns property beyond its jurisdiction, or is to any extent engaged in interstate or foreign commerce, that portion only of its net income which is not derived from the said sources shall be apportioned to this commonwealth and taxed hereunder. Each corporation, in connection with the return required by section one of this act, shall state in such form as the tax commissioner shall prescribe what portion or amount of its annual net income is apportionable to this commonwealth, as provided in this section. A tax is hereby laid on every such corporation of one per cent of the said income to be assessed in the manner hereinafter provided.

. . . . . .

SECTION 5. The tax imposed by this act shall be construed as a temporary emergency tax levied in addition to all other taxes imposed on foreign corporations, and not to any extent as a part of the system of taxation established by sections fifty-four to fifty-six, inclusive, of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine and acts in amendment thereof or in addition thereto.

SECTION 6. This act shall take effect upon its passage and shall be operative for one year only. [*Approved May 29, 1918.*

MASS. GEN. ST. 1918, C. 255.

AN ACT IMPOSING AN ADDITIONAL TAX UPON THE NET INCOMES OF DOMESTIC CORPORATIONS.

Be it enacted, etc., as follows:

SECTION 1. Every corporation incorporated under the laws of this commonwealth and doing business for profit shall pay a tax to the commonwealth computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States. Every corporation subject to the tax imposed by this act shall render to the tax commissioner, under oath or affirmation of its treasurer or assistant treasurer, on or before the first day of July in the year nineteen hundred and eighteen, unless the fiscal year of the corporation for which it made return to the federal collector of internal revenue ended between the thirtieth day of April and the first day of July, both inclusive, in which case such report shall be rendered by the corporation within sixty days after the date of the closing of its said fiscal year, a true copy of the last return made to the collector of internal revenue of the annual net income arising or accruing from all sources in its fiscal or calendar year next preceding, stating the name and situation of the principal place of business of the corporation; the kind of business transacted, and a list of all subsidiary companies, if any, with the location of the principal place of business of each;

the gross amount of its income, received during such year from all sources, and the amount of its ordinary necessary expenses paid out of earnings in the maintenance and operation of the business and properties of such corporation; and other information as may be requested by the United States treasury department for the purpose of ascertaining the total amount of net income taxable under the United States income tax act; the net income of such corporation after making the deductions authorized; the amount of taxes paid upon its income to the federal internal revenue department for the year next preceding the one for which such return is made; in case of a corporation which carries on business outside the commonwealth, the fair cash value of its real estate and tangible personal property in each city or town in this commonwealth, and the fair cash value of its real estate and tangible personal property located outside of this commonwealth; in case of a corporation deriving profits principally from the holding or sale of intangible property, the gross receipts from its business within and without this commonwealth and the gross receipts from its business within this commonwealth.

. . . . . .

SECTION 3. If such corporation carries on business outside of this state, a portion of the net income on which the tax is imposed by the United States shall be apportioned to this state as follows: In case of a company deriving profits principally from the ownership, sale, or rental of real estate, and in case of a corporation deriving profits principally from the sale or use of tangible personal property, such proportion as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such corporation in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of any incumbrance thereon; in case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its

gross receipts in this state for the year ending on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the state. In case neither of the above methods are applicable, the tax commissioner shall determine, in such manner as he deems equitable, the proportion of the net income received from business carried on within this commonwealth.

. . . . . .

ARGUMENT.

I.

Question at Issue.

This is an action for money had and received brought at common law to recover from the defendant in his personal capacity the entire amount of the two taxes paid to the Commonwealth of Massachusetts by the plaintiff in 1918, one under St. 1909, c. 490, Pt. III, sec. 56, and the other under St. 1918, c. 253, on the ground that those statutes, both severally and in their combined operation, are in violation of the Federal Constitution, in that they impose a direct burden upon interstate commerce and tax property beyond the jurisdiction of the State. The plaintiff specifies its objections to these statutes in its assignment of errors (Rec., p. 20) as follows:

1. "The Massachusetts Acts of 1909 (c. 490, Part 3, sec. 56) and of 1918 (c. 253) are unconstitutional and void, because they and each of them violate the 'commerce' clause of the Federal Constitution".

2. "The said Acts constitute a 'system' of taxation; that, if one is unconstitutional, the other fails also; and that their

combined practical effect, in actual operation, is the sole test of their validity."

3. "The $2,000 maximum limitation in the said 1909 Act, in its practical operation and effect, was 'removed' by the passage of said Acts of 1918 in the same way as it was 'removed' by chapter 724 of the Acts of 1914, as held in International Paper Co. *v.* Massachusetts (246 U. S. 135)."

No question is raised or could be raised in these proceedings as to whether, if these statutes are valid, the taxes were properly assessed in accordance with their provisions. Any such questions of course would not affect the general validity of the taxes as a whole and could be raised only by the procedure established by the State statutes for obtaining in abatement in cases of excessive assessment. See St. 1909, c. 490, Pt. III, sec. 70; St. 1918, c. 253, sec. 4; and St. 1918, c. 255, sec. 7. There is no right to recover at common law in any case of a mere overpayment.

Osborne *v.* Danvers, 6 Pick. 98.
Preston *v.* Boston, 12 Pick. 7.

Upon this point however it must be noted that the income tax assessed under the statutes of 1918 was assessed upon an amount said by the corporation to be the income derived from its Massachusetts business. (Rec., pp. 13, 16). No other course was open to the taxing officials. If the plaintiff did not properly in its return allocate its total net income to Massachusetts, it cannot now be heard to complain.

II.

The Constitutional Questions raised by the Plaintiff are Not Necessarily Involved in this Case.

It is not necessary in order to dispose of this case to decide the Federal questions raised by the plaintiff. Even if it should be held that either or both of the taxes involved were invalid, the plaintiff cannot recover from the defendant personally any part of the amounts paid.

In the first place, in view of the provisions of Mass. St. 1909, c, 490, Pt. III, sec. 70, giving a direct remedy against the Commonwealth in all cases where it is claimed that a tax has been assessed upon a corporation in violation of law and providing that such remedy shall be exclusive, the defendant under no circumstances is subject in Massachusetts to any common law liability in connection with the receipt of this payment. In the second place, both of these payments were made entirely without any protest on the part of the plaintiff or any notice by it to the defendant of any claim that the taxes were invalid or that it would hold him personally liable for the amounts paid. Accordingly, as to him these payments were voluntary payments and cannot be recovered.

Both of these matters have been fully argued to this Court in No. 98, Burrill *v.* Locomobile Co., and No. 99, Burrill *v.* Russell Miller Milling Co., and need not now be repeated. The Court is respectfully referred to the brief of the present defendant as plaintiff in error in those cases.

It accordingly follows that, as the defendant can in no event be held liable in this case, the judgment of the District Court should be affirmed without considering the constitutional questions.

III.

The Statutes involved in this Case and the Taxes assessed thereunder are in All Respects Valid.

The payment which the plaintiff is seeking to recover is composed of two separate and distinct taxes, assessed upon two entirely different bases and under two separate statutes. It is only by an accident that they happened to be paid upon the same day in the case of this corporation. As will subsequently appear they will be paid by most corporations, in view of the manner of their determination, at two different periods in the year.

These statutes and the taxes assessed under them must thus be considered both severally and in their combined operation.

1. *Tax of $480 under St. 1909, c. 490, Pt. III, Sec. 56, Valid.*

This is an excise tax of one-fiftieth of one per cent of the par value of its authorized capital stock which every foreign corporation conducting a domestic business in Massachusetts was required annually to pay for the privilege of carrying on such a business. This tax however, "shall not in any one year exceed the sum of $2,000". St. 1909, c. 490, Pt. III, sec. 56, *supra*, p. 4. It does not become due at any particular date

but the corporation is required to file annually at a prescribed period after the date fixed for its annual meeting a certificate of its financial condition. As a condition precedent to the filing of this certificate it is required to pay this tax. St. 1909, c. 490, Pt. III, secs. 54, 55.

Taxes imposed under this statute standing by itself have twice been sustained by this Court against the contention that they burden interstate commerce and are imposed upon property beyond the jurisdiction of the State.

Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68.

Cheney Bros. Co. *et al. v.* Massachusetts, 246 U. S. 147.

These decisions were chiefly based upon the ground that, as this tax is limited in any event to a reasonable amount of $2,000, which might be fairly charged in any event as a license fee for the privilege of doing business within a state, the tax cannot be regarded otherwise than as a reasonable excise.

Subsequently, by St. 1914, c. 724, *supra*, p. 4, the State sought to increase the burden imposed upon certain foreign corporations by requiring an additional excise of one hundredth of one per cent of the par value of the authorized capital stock of all corporations having an authorized capital in excess of ten million dollars. When this statute came before this Court it was held to be unconstitutional on the ground that the imposition upon a foreign corporation of a tax measured by a fixed percentage of its entire authorized capital stock amounted to some-

thing more than a reasonable license fee and had the necessary effect, in the case of corporations engaged in interstate commerce or owning property outside the state, of imposing a direct burden upon such commerce and of taxing such property beyond the jurisdiction of the State.

> International Paper Co. *v.* Mass., 246 U. S. 135.

It was also at the same time held by this Court in the last mentioned case and in Locomobile Co. *v.* Massachusetts, 246 U. S. 146, that the combined operation of these two statutes, namely, that of 1909 and 1914, was to establish a single tax measured by the entire authorized capital without limitation. Therefore it held invalid in these cases taxes of less than $2,000 assessed solely under the statute of 1909 but while the 1914 statute was in effect. Whether this decision is to stand, in view of the subsequent decisions of the Supreme Judicial Court of Massachusetts that the two statutes and the taxes imposed by them are in all respects separate and severable, is now before this Court for determination in No. 98, Burrill *v.* Locomobile Co., and No. 99, Burrill *v.* Russell Miller Milling Co.

This question, however, has no relation to any of the questions involved in the case at bar, for almost immediately after the announcement of the decisions of this court in International Paper Co. *v.* Massachusetts and Locomobile Co. *v.* Massachusetts, the legislature of Massachusetts repealed St. 1914, c. 724. This repeal became effective on March 18, 1918, Gen. St. 1918, c. 76, *supra*, p. 4.

It was thereupon decided by the Supreme Judicial Court of Massachusetts that it was the intention of the legislature by this repeal to leave the statute of 1909 in full force unaffected by the statute of 1914, and in precisely the same condition as it had existed prior to 1914. It accordingly held, purely as a matter of construing these enactments, that the statute of 1909 was then in full effect and that, as this Court had held, the taxes imposed by it, limited as they were in all cases to $2,000, were in all respects valid.

> Lawton Spinning Co. *v.* Commonwealth, 232 Mass. 28.

The result plainly was that, immediately after March 18, 1918, the statutes of Massachusetts imposing taxes upon foreign corporations were in precisely the same form as existed prior to the enactment of St. 1914, c. 724, and that taxes assessed under them were valid after that date precisely as they were valid before the statute of 1914 became effective on July 1, 1914. If there had been no further legislation, the validity of this tax of $480 assessed upon the plaintiff entirely under the statute of 1909 after the repeal of the statute of 1914 could not be questioned.

2. *Tax of $3,525.94 under St. 1918, c. 253, Valid.*

This statute was enacted for the purpose of raising temporary additional revenue required by the emergency of the Great War. As appears by its title and by sections 5 and 6, *supra*, pp. 5, 7, it was declared by the Legislature to be a "temporary emergency tax levied in addition to all other taxes imposed on foreign corporations", and was to be operative for one year

only. It took effect upon its approval on May 29, 1918. At the same time a similar temporary emergency tax for a period of one year, at least equally as burdensome, was imposed upon domestic corporations. Gen. St. 1918, c. 255, *supra*, p. 7.

The statute in question required foreign corporations conducting a domestic business within the Commonwealth to pay a tax of one per cent of their net income derived from domestic business during their last fiscal or calendar year. The corporations were required to file a copy of their last returns to the Federal government under the Federal Income Tax Law then in force, and it was provided that the net income upon which this tax was based should be the same net income upon which they were required to pay taxes to the Federal government.

By section 3 it was expressly provided

"If any such corporation carries on business outside of this commonwealth, or owns property beyond its jurisdiction, or is to any extent engaged in interstate or foreign commerce, that portion only of its net income which is not derived from the said sources shall be apportioned to this commonwealth and taxed hereunder".

Each corporation in connection with its return was required to state the portion of its annual net income apportionable to the State under this provision. It was upon this portion of its income only that it was required to pay a tax of one per cent.

The plaintiff by its tax return showed its net income to be $460,767.46. (Rec., p. 12, Item 7.) In item 8, Record, p. 13, it was given an opportunity to eliminate from its total net income any net income derived

from business carried on outside of the State or from property beyond its jurisdiction or to any extent from interstate or foreign commerce, and to state the net amount not derived from such sources. Under this item it merely gave the amount of its Federal Income Tax paid in 1917, which seems to have no relation to the information sought, and then stated "deduct rentals from real estate in New York $1,650, not deducted above." Later in answer to an inquiry from the Tax Commissioner it made the following statement in a letter to him: —

> "Total net income, Item 7, we stated as $460,767.46. Of this amount $1,650 was derived from rentals of property situated in New York, which was entered by us in Item 8 of your blank. The remainder, therefore, $459,117.46, was derived from business carried on in Massachusetts." (Rec., p. 16.)

This corporation thus plainly stated that its net income derived from its strictly Massachusetts business as defined in Section 3 of this act was $459,117.46. The Tax Commissioner therefore had no other course than to assess the tax at one per cent of this sum, namely, at $4,591.17. If this resulted to any extent in a tax upon sales made in other states, effected through interstate shipments, it was the fault of the plaintiff in not eliminating such income in determining its Massachusetts net income, as it was requested to do.

After the Massachusetts Court had held in American Printing Company *v.* Commonwealth, 231 Mass. 237, that a proper interpretation of Gen. St. 1918, c. 255, imposing a similar tax on domestic corporations, required the deduction of the excess profits taxes paid

the Federal government in assessing this State tax, the same interpretation was given by the Tax Commissioner to the statute under consideration, and the plaintiff then received a refund of $1,065.23, being one per cent of the amount of its excess profits tax. Thus, the tax under this statute finally paid by it amounted to $3,525.94, which was thus based on its net income after deducting both the excess profits tax paid by it and also all net income reported by it to have been derived from business or property outside the state or from interstate or foreign commerce.

As the language of the statute plainly shows this tax was not intended to be a permanent addition to the tax system of Massachusetts. It was expressly declared to be "a temporary emergency tax" (sec. 5), and was operative only for one year (sec. 6). A similar temporary tax was imposed at the same time upon domestic corporations, Gen. St. 1918, c. 255, *supra*, p. 7. This tax was also levied at the rate of one per cent on the net income as determined by the Federal Income Tax Law after excluding income derived from business carried on outside the State determined in a manner provided for by the statute (sec. 3). It is obvious that this tax upon domestic corporations was at least as burdensome as that imposed by the statute under consideration upon foreign corporations. There was thus no discrimination against foreign corporations.

H. P. Hood & Sons *v.* Commonwealth, 235 Mass. 572, 576.
Shaffer *v.* Carter, 252 U. S. 37.

In the next year these two temporary statutes were revived, re-enacted and made effective for one year

more. Gen. St. 1919, c. 342, sec. 1. In this year, however, a new and permanent method of taxing both domestic and foreign corporations was substituted for the form of taxation theretofore in force, which among other things entirely abandoned the excise tax upon foreign corporations based upon authorized capital stock. Gen. St. 1919, c. 355. This new statute became effective in 1920.

In view of the temporary character of this tax, the modest rate at which it was assessed and the emergency which produced it, there has been little litigation in the Courts of Massachusetts concerning it.

In Eaton, Crane & Pike *v.* Commonwealth, 237 Mass. 523, it was held that this tax as revived in 1919 was an excise and not a property tax. It thus must be regarded by this Court as a temporary excise imposed upon foreign corporations in addition to the excise imposed by the statute of 1909 based upon authorized capital which has heretofore been discussed.

The sole question is whether, as such an excise determined in the manner provided in the statute, it violates any rights guaranteed to this corporation by the Federal constitution.

In H. P. Hood & Sons Co. *v.* Commonwealth, 235 Mass. 572, the main question was whether the sale of milk at retail to consumers after the same had been brought into the State from other states constituted interstate commerce. Reaching the conclusion that such business was not interstate commerce, the court held that income derived from it was taxable under this statute. The court pointed out that "the statute in imposing the additional tax expressly exempts from its scope interstate commerce and property outside the

Commonwealth". Page 576. Referring to the net income that the plaintiff in that case "derived from sales of milk and other articles either outside of Massachusetts or by direct shipment to its customers inside the Commonwealth from outside its limits", the court said: "confessedly this part of its income is not subject to the tax." Page 575.

The language of section 3 of the statute in question already quoted is unmistakable. It definitely excludes from the scope of this tax income derived, (1) from business carried on outside the Commonwealth; (2) from property owned by it beyond the jurisdiction of the Commonwealth; and (3) to any extent from interstate or foreign commerce. It makes taxable "that portion only of its net income which is not derived from the said sources." The tax is thus confined strictly to net income entirely produced by domestic transactions in the strictest sense. If a corporation derives income from the manufacture of goods in Massachusetts and their sale by direct shipment to customers outside of Massachusetts, that income, being in part the result of an interstate transaction, is not taxable under the statute.

Thus, this statute by its express terms escapes the difficulties encountered by the statute under review in International Paper Co. *v.* Commonwealth, *supra*, and Locomobile Co. *v.* Commonwealth, *supra*. It even escapes the objections unsuccessfully made against the taxes before this court in United States Glue Co. *v.* Oak Creek, 247 U. S. 321, and Shaffer *v.* Carter, 252 U. S. 37. In the first of those cases this Court sustained a tax levied upon the net income of a domestic corporation, even though that income was to a substantial

extent derived from or produced by transactions in interstate commerce, on the ground that such a tax upon net income was not a direct burden upon interstate commerce. In the second of these cases this Court applied the same principle to a non-resident, holding it within the power of a state to tax such a non-resident upon net income earned within the state even though that net income was in part derived from interstate commerce. See also, Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113.

It is obvious therefore from these decisions that the draftsman of this statute was unnecessarily cautious, and that in excluding net income earned within the State from interstate commerce he went further than was necessary, leaving untouched an entirely legitimate source of revenue.

It seems conclusively to follow that this tax standing by itself imposes a burden, whether direct or indirect, only upon such part of the business of foreign corporations conducted in Massachusetts as is entirely within the taxing power of that State.

3. *These Two Statutes in their Combined Operation are entirely Valid.*

It appears to be the contention of the plaintiff that, whatever may be said as to either of these statutes or the taxes assessed under them standing alone, in their combined operation they necessarily imposed a burden on interstate commerce and taxed property beyond the jurisdiction of the State. This contention appears to be entirely based upon the decisions of this Court in International Paper Co. *v.* Massachusetts, *supra*, and Locomobile Co. *v.* Massachusetts, *supra*, where the Court held that the combined operation of

the statute of 1909 now involved in this case and St. 1914, c. 724, imposing an additional tax unlimited in amount based also upon authorized capital and applicable to all corporations whose tax reached the $2,000 limit established by the 1909 statute, produced an unconstitutional result.

The contention seems to be that this Court has decided that in no event can an excise of more than $2,000 be imposed upon a foreign corporation for the privilege of doing business within a state. An examination of the reasonings which produced those decisions will show that no such interpretation can be put upon them and that they have no application to the case at bar.

The precise nature of the tax and of the questions regarding it before this Court in those cases must be carefully examined in order to give to them their true weight. The only tax or taxes then in question were taxes determined at a fixed percentage of the authorized capital stock of the corporation. No other elements were taken into consideration. It was immaterial that only a part of the autnorized capital stock had actually been issued or that but an infinitesimal part of it was employed in the State. The size of the tax bore no relation whatever to the extent of the business done by the corporation in the state.

The question of the validity of such a tax had been much discussed in this Court with substantial differences in opinion. See Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, and companion cases in that volume. Compare Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68. Finally in Looney *v.* Crane Co., 245 U. S. 178, this Court unanimously reached the

conclusion that in all cases a tax thus measured by the entire authorized capital stock, levied upon any foreign corporation engaged in interstate commerce or having property outside the state, under a statute which contained no provision establishing a reasonable limitation upon its amount, was void.

This conclusion was based solely upon the ground that a tax thus measured, when not limited to a sum which would be in any event a reasonable license fee for conducting a local place of business, necessarily ceased to be a mere excise or license fee and became in practical effect, because of the manner in which it was determined, a tax imposing a direct burden upon all property of the corporation wherever situated and upon all business transactions carried on by it. It is accordingly plain that it was the method established for determining the amount of the tax in this case which caused it to be struck down by this Court.

When, therefore, the Massachusetts taxes assessed under the two statutes of 1909 and 1914, both measured by a fixed percentage of authorized capital stock, came before the Court in International Paper Co. *v.* Massachusetts, *supra*, and Locomobile Company *v.* Massachusetts, *supra*, it had only to apply the principles just laid down by it in Looney *v.* Crane Co., *supra*. In those cases, reaching the conclusion the combined effect of the Massachusetts statutes was merely to impose a single tax measured by authorized capital without limitation, upon the same reasoning it held those taxes invalid, not upon the ground that they exceeded $2,000, for in the second case the amount was much less than that sum, but upon the ground

that the tax was one of precisely the same character as that before it in Looney *v.* Crane Co.; that therefore, as its measure was the entire authorized capital of the corporation, it must be regarded for that reason as directly burdening interstate commerce and as imposed upon property outside the state.

In no case, however, not even in cases involving taxes measured by authorized capital, has this court held $2,000 to be the highest amount which can be imposed upon a foreign corporation for the privilege of conducting a business within a state. In the International Paper Co. case it expressly reaffirmed the decision in Baltic Mining Co. *v.* Massachusetts, *supra*, to the effect that a tax upon a foreign corporation measured by a fixed percentage of authorized capital was valid provided that it was limited in any event to an amount which would not be regarded as an unreasonable license fee to impose on all foreign corporations for the privilege of conducting a domestic business; and further affirmed the decision of that case that an annual excise of $2,000 was not an unreasonable one to be charged in such cases.

Subsequently, in General Railway Signal Co. *v.* Virginia, 246 U. S. 500, a similar tax limited by a sliding scale maximum, which might in certain cases somewhat exceed $2,000, was also sustained, but no final limitation has as yet been imposed upon the amount which may be charged even as such an excise.

The reasoning of Looney *v.* Crane Co. can have no application in the consideration of a tax determined in the manner established by Gen. St. 1918, c. 253. That tax, which is imposed for the privilege of conducting a local business in Massachusetts, is measured strictly by

the extent of the local business determined by the most obvious measure namely, by the net income produced solely by it. The tax increases or decreases in direct proportion to the size of the local business. The modest rate of one per cent makes it clear that there was no purpose of imposing any burden directly or indirectly upon any other income. It must be said to be a tax solely upon domestic business and burdening that business alone.

The combined result of the two statutes is that a foreign corporation pays in the years in question in Massachusetts an excise of not more than $2,000 for the privilege of maintaining a local place of business, an amount which this Court has held to be a reasonable license fee which may be exacted by a state of a foreign corporation for that purpose in all cases (Baltic Mining Co. *v.* Mass. *supra*, and Cheney Bros. Co. *v.* Mass. *supra*) and in addition a further excise of one per cent of its net income from its local business, which is thus a tax measured by and varying with the extent of that local business.

It cannot be doubted that any state may require payment by a non-resident corporation of a license fee for the privilege of maintaining a place of business within a state and may then in addition tax such corporation at a reasonable rate upon the net income of the business done at that place of business. As each of these two taxes standing alone would be plainly valid under the decisions of this Court, in that they are imposed upon subjects of taxation entirely within the control of the State, the two when imposed in the same year amount to nothing more than an increase in the amount of a tax imposed upon a subject of

taxation entirely within the control of the State. This Court does not concern itself about the extent of a tax thus levied.

Hamilton Co. *v.* Massachusetts, 6 Wall. 632.
Flint *v.* Stone Tracy Co., 220 U. S. 107.
Kansas City, etc., Ry. Co. *v.* Kansas, 240 U. S. 227.
Kansas City, etc., R.R. Co. *v.* Stiles, 242 U. S. 111.

In the case at bar however it should be noted that the excise paid by the plaintiff based on its authorized capital amounted only to $480, about one-fifth of the amount which this court has sustained as a reasonable license fee for maintaining a place of business; that in addition it has paid a tax of only $3,525.94 for the privilege of conducting at this place of business a Massachusetts business from which it itself concedes that it has derived in one year the sum of $459,117.46. In view of the extent to which it would be within the power of Massachusetts to tax this net income, if it imposed no other taxes upon the corporation, it can hardly be said that these trifling privilege taxes impose any unreasonable burden upon this corporation.

Even if the conclusion could be reached that the combined operation of these two statutes necessarily imposed an unconstitutional burden upon the plaintiff, it would by no means follow that the tax assessed upon it of $480 under the statute of 1909 would be invalid.

Section 5 of the statute of 1918, imposing the Income Tax, is as follows:

"The tax imposed by this act shall be construed as a temporary emergency tax levied in addition to all other taxes im-

posed on foreign corporations, and not to any extent as a part of the system of taxation established by sections fifty-four to fifty-six, inclusive, of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine and acts in amendment thereof or in addition thereto."

It is, of course, not conteaded as the plaintiff seems to assume, that this section is of any importance in determining the practical effect of the two taxes in question in their combined operation.

It was plainly the only purpose of the legislature, in inserting this section in the statute, to declare its intent that the new temporary additional tax, based upon income, should be regarded as in every way separate and severable from the tax based upon authorized capital imposed by the statute of 1909. The decisions of this court in International Paper Co. *v.* Massachusetts, *supra*, and Locomobile Company *v.* Massachusetts, *supra*, had been just rendered at the time this statute was under consideration by the legislature. It of course wished to prevent the possibility of any similar effect upon the statute of 1909 by the enactment of this statute as the Court had decided had been produced upon that statute by the statute of 1914. Its intention thus was that, if for any reason the taxes imposed by the new statute were invalid, such invalidity should not in any way affect the taxes assessed under the statute of 1909. By this section the legislature in substance declares its intention that, if the statute of 1918 cannot be enforced, taxes shall continue to be assessed against foreign corporations under the statute of 1909 alone. This Court of course will carry such an intention into effect.

For a further discussion of this point, see brief for plaintiff-in-error in No. 98, Burrill *v.* Locomobile Co., and No. 99, Burrill *v.* Russell Miller Milling Co.

IV.

Conclusion.

In accordance with the foregoing argument, the defendant in error submits that the judgment for the defendant entered by the United States District Court should be affirmed, first, upon the ground that he is under no circumstances personally liable to repay to the plaintiff the taxes involved in this case, and second, upon the ground that those taxes are in all respects valid.

Respectfully submitted,

WM. HAROLD HITCHCOCK,
Attorney for Defendant in Error.

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

I.

No Discrimination in Tax imposed upon the Plaintiff under Statute 1918, Chapter 253.

In its brief in this Court, the plaintiff for the first time contends that there are certain arbitrary discriminations in the taxes imposed upon foreign and domestic corporations by Chapters 253 and 255 of the Statutes of 1918, which, it is claimed, constitute a denial of equal protection of the laws to the plaintiff in violation of the Fourteenth Amendment.

1. No such contention was made by the plaintiff in its requests for rulings in the District Court (Rec., p. 17), nor by its assignment of errors. (Rec., p. 20.) It therefore now comes too late. (Rule, 35.)

2. No such discriminations in fact exist in this statute.

The Federal Constitution does not require uniformity in state taxation. It is enough, if some general scheme be adopted which does not result in unreasonable discrimination and is not arbitrary or fanciful in its operation.

Bells Gap Railroad Co. *v.* Pennsylvania, 134 U. S. 232.
Thomas *v.* Gay, 169 U. S. 264.
Cole *v.* LaGrange, 113 U. S. 1.
Royster Guano Co. *v.* Virginia, 253 U. S. 412, 415.
Dane *v.* Jackson, 41 Sup. Ct. Rep. 566.

The first alleged discrimination pointed out by the plaintiff grows out of the fact that the tax year, adopted by St. 1918, 253, in imposing the income tax on foreign corporations, was either the calendar year or the fiscal year of the corporation, depending upon the year for which the corporation had elected to be taxed under the Federal Income Tax Law.

The reason for the adoption of this method of determining the tax is plain. The tax imposed by this statute was a temporary one imposed for one year only because of an unusual emergency. It was desired to impose and collect this tax in the simplest possible manner and with as little annoyance to the corporations as possible. Every corporation was being required by the Federal Government to file an annual return of its income and was given the option of making that return either for the calendar year or for its last fiscal year, in the event that it did not correspond with the calendar year. Being required to make this return it would be a simple matter for a corporation merely to file a duplicate of it with the State authorities, and to pay a tax of 1 per cent imposed upon precisely the same income that should be found to be taxable under the Federal Income Tax Law.

If a different tax year, than that which was being used in determining the Federal Tax, had been adopted or a different method of determining the taxable income, a heavy burden would have been imposed upon the corporations in requiring them to make an entirely new return upon a different basis. The corporations had already made their election, as to whether their taxable year should be the calendar year or their fiscal year, for the purpose of the onerous tax imposed by the

Federal Law, and it was no hardship but rather a distinct benefit to require them to adopt the same tax year for the purpose of this modest tax of 1 per cent. Surely they cannot be heard to complain that they have not been given an opportunity to change their tax year after the year had expired for the purpose of reducing their tax.

It will be noted that the general scheme of this statute and of Chapter 255, of requiring the filing of a duplicate of the Federal Tax Return, of adopting the tax year of the Federal tax, and of imposing a tax on the same income upon which, after due correction by the Federal authorities, the corporation pays a Federal tax is precisely the same as that of the Connecticut Corporation Income Tax statute sustained by this Court in Underwood Typewriting Co. *v.* Chamberlain, 254 U. S. 113. The objection now raised by the plaintiff does not seem to have been thought worthy of suggestion in that case either in this Court or the State court. (94 Conn. 47.)

The second alleged discrimination pointed out by the plaintiff grows out of the fact that St. 1918, c. 255, in imposing a similar tax on domestic corporations, established by section 3 a definite formula for determining the portion of the net income of such corporations derived from business conducted within the State, while no such definite formula is established in connection with the taxation of foreign corporations under Chapter 253. An examination however of the third section of each of these statutes will show that, if there is any discrimination in their requirements, it is against domestic corporations in favor of foreign corporations rather than the reverse.

As already pointed out, section 3 of the statute taxing foreign corporations expressly excludes from the income to be taxed all income from business carried on outside the Commonwealth, all income from property owned beyond its jurisdiction and all income to any extent derived from interstate or foreign commerce. No method is established by the statute for determining the strictly domestic income earned in Massachusetts which is thus to be taxed, but the statute provides:—

"Each corporation, in connection with the return required by section one of this act, shall state in such form as the tax commissioner shall prescribe what portion or amount of its annual net income is apportionable to this commonwealth, as provided in this section."

Thus it is left entirely to each corporation to determine what portion of its total net income is domestic income within the meaning of this section. The result is that this entire statute amounts to little more than a direction to foreign corporations to determine in their own way the portion of their net income earned in Massachusetts, and to contribute 1 per cent thereof in taxes to the Commonwealth. Thus, each corporation is dealt with in accordance with its own peculiar conditions and in the absence of obvious errors and concealments its determination must as a practical matter be final.

Section 3 of the statute taxing domestic corporations makes no exclusions from the total net income of the corporation for the purposes of this tax, except in the case of domestic corporations carrying on business outside of the Commonwealth. In the case of such corporations the income derived from so much of the

business as is carried on outside of the State is excluded from the tax, and a formula is adopted for determining the amount of such out of the state income in the cases to which it is applicable. The reasonableness of this formula, if that question be material here, need not now be discussed, as precisely the same formula was approved by this Court in Underwood Typewriting Co. *v.* Chamberlain, *supra*.

It must be noted, however, that domestic corporations are required to pay a tax upon income earned within the State, even though it be derived from interstate commerce; while income of that character is entirely exempt in the case of foreign corporations. It is plain for this reason alone that the tax on domestic corporations is, in all cases where any part of the business is interstate commerce, more burdensome than that imposed on foreign corporations.

The foregoing analysis demonstrates that the Massachusetts Court was unquestionably right when it said, in H. P. Hood & Sons *v.* Commonwealth, 235 Mass. 572, 576.

> "The present tax is not discriminatory against foreign corporations. An additional tax on domestic corporations quite as onerous in its terms was imposed by St. 1918, c. 255, taking effect on the same day as the statute here in question."

3. Furthermore the plaintiff has no standing upon this record to make the objections to this statute just discussed.

There is no evidence that it has been in any way injured by the fact that it was not permitted to choose between the calendar year and its fiscal year in making its return. So far as the record shows its income for

its fiscal year ending May 31, 1918, upon which this tax is based (Rec., p. 11), was substantially less than its income for the calendar year 1917.

Then the plaintiff had no business outside the State, its only place of business being in Massachusetts. There it manufactured and sold all its goods. (Rec., p. 9.) Its real estate in New York appears to have been in no way used in connection with its regular business. From it the corporation received rentals, and these rentals were entirely excluded in determining its tax. (Rec., p. 16.) Even if a formula for the determination of income earned from business without the State, similar to that employed in taxing domestic corporations, had been inserted in this statute, such a formula would not have been applicable and the plaintiff's tax would have been the same.

Again this corporation has never raised any question as to the amount of its domestic income. Its own statement of the amount of that income was accepted by the Tax Commissioner without question and the tax computed upon it. (Rec., p. 16.)

II.

The Defendant not Personally Liable.

The taxes paid in this case never came under the personal control of the defendant, having been received without his personal knowledge and deposited in a bank account of the Commonwealth by a subordinate in his office. (Rec., p. 9.) Money thus paid into the Treasury of the Commonwealth could not be legally paid out except on a warrant signed by the Governor, approved by the Council and based upon a

legislative act of appropriation. For the plaintiff to make a payment of money actually in the treasury of the Commonwealth, except in accordance with the requirements of the Constitution and the Statutes of Massachusetts, would constitute a misapplication of funds by him, a breach of trust which would subject him to possible criminal prosecution or removal from office by impeachment. See brief, No. 98, Burrill *v.* Locomobile Co., page 36, argued immediately preceding the case at bar.

As no protest and no notice of a claim of illegality or of intention to hold him personally liable was made or given to the defendant at the time of these payments, they must be held so far as the defendant is concerned purely voluntary payments for which there can be no recovery from him. This case is thus precisely like No. 98, Burrill *v.* Locomobile Co.; therefore the argument made in that case is not repeated here.

One element relied upon by the plaintiff in No. 98 is absent here so far as the income tax imposed under the Statute of 1918 is concerned. This was the first year of that tax and there is no suggestion in the record that at the time of this payment by the plaintiff any other foreign corporation had claimed the tax to be invalid or had started any legal proceedings to test it. Therefore so far as this tax is concerned there was no pending litigation which could under any circumstances be claimed to be notice to the defendant of the alleged illegality of the tax.

The citation of the case of Smyth *v.* Ames, 169 U. S. 466, 517, to the point that a common law remedy still exists in the Federal Courts notwithstanding St. 1909, c. 490, Pt. III, sec. 70, is entirely inapt. The only

question under discussion in that case was whether a remedy in equity existed in the Federal Court in a case where a statutory remedy had been established in the state courts. No question was involved in that case as to whether any provisions of the common law had been abrogated by the state legislature. The Court merely took jurisdiction in equity upon well settled principles in spite of the statutory remedy in the state court. It is not disputed that the plaintiff in the case at bar, before the payment of the tax in question, could have proceeded by a bill in equity in the Federal Courts to enjoin the collection of the tax now in question upon the ground of its unconstitutionality.

Respectfully submitted,

WM. HAROLD HITCHCOCK,
Attorney for Defendant in Error.

JOHN L. WHITING—J. J. ADAMS COMPANY *v.* BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 113. Argued January 26, 1922.—Decided February 27, 1922.

Decided upon the authority of *Burrill* v. *Locomobile Co., ante,* 34. Affirmed.

Mr. Charles L. Favinger, with whom *Mr. Edward E. Blodgett* and *Mr. William P. Everts* were on the brief, for plaintiff in error.

Mr. Wm. Harold Hitchcock for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit like the two just decided, *ante*, 34, to recover taxes paid under the Act of 1909 there mentioned and St. 1918, c. 253. In this case as in the other the statutes provided a remedy that excluded an action against the Treasurer at common law. St. 1909, c. 490, Pt. III, § 70. St. 1918, c. 253, § 4. St. 1918, c. 255, § 7. The District Court gave judgment for the defendant on the merits. Without going into them it follows that the judgment must be affirmed.

Judgment affirmed.

MR. JUSTICE PITNEY, being absent, took no part in the decision.